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ON THE LAW OF TREASON.

The controversies which have lately arisen upon the extent and meaning of the law of treason, in the Constitution of the United States, prove the impossibility of preventing disputes, by mere legislation. One would have thought that no language could be plainer than that of Article iii.: —

"Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort:" —

yet it is obvious, that in regard to what is levying war, or adhering to enemies, giving them aid and comfort, there is room for great diversity of opinion. The inquiry into the meaning of the term, levying war, has assumed serious importance of late, from the agitation in the South, to induce certain States to secede from the Union; and, in the North, to excite a forcible resistance to the execution of a law of the Union. The former, indeed, resolves itself into the latter; since it necessarily involves a denial of the authority of the national government, and a forcible resistance to all its laws, within the limits of the seceding State. The government of the United States was established by the people, for their common safety and welfare, by withdrawing from the individual States a portion of their sovereignty, and vesting it in a union of the whole; and any attempt, forcibly to sever or dissolve that Union, whether by the secession of one State, or of many, without the consent of all, has all the constituent elements of treason

against the General Government, as it strikes at the root of that common welfare and safety, which this government was ordained to secure, and directly denies and resists its authority.[1] In a broader view, a single State has no more right to withdraw from the Union, than the other States have to eject it from the Union; each State being severally entitled to the security and protection derived from the Union, and all the States collectively being entitled to the aid of each one, in preserving the integrity of that Union, and thus securing the welfare of the whole. (See 3 Story's Rep. 617.)

Our present purpose, however, is not to discuss the question of the right of secession, but to make a few observations on the law of treason, with particular reference to what is meant by levying war, and who may be implicated in that crime.

The liability of persons, who were not actually present at the scene of hostile demonstration, has been stoutly denied in certain quarters; on the ground, that to hold them liable, is to make them traitors by construction; and that this is contrary to the Constitution, which virtually repudiates all constructive treasons. The fallacy of this argument lies in not distinguishing between constructive treason, and constructive presence at a particular act of treason. That treasons ought not to be multiplied by construction, is undeniably true. To make them so, has been the endeavor of despots; to prevent this, has been the object of the people, in all their struggles for freedom.

Treason is universally admitted to be a crime of the greatest magnitude; and yet no crime was anciently so ill defined. Among the ancient Romans, it was termed the *crimen læsæ majestatis*, and was understood to denote whatever was attempted in violation of the sovereign authority of the State. It was further distinguished into two kinds; — *crimen perduellionis*, which included whatever was attempted directly against the being or safety of the republic, or of the prince or his ministers; and *crimen læsæ majestatis in specie*, which consisted in whatever was attempted indirectly against the dignity and prerogative of the republic or prince. Under these general and loose definitions, it was held equally treasonable to adhere to the

[1] One of the grounds on which the adoption of the Constitution was opposed, was, that by the operation of this article, the right of secession was taken away. See Luther Martin's letter to the Legislature of Maryland, in Secret Debates, p. 81, 82.

public enemies; to introduce armed hostile troops into the city; to falsify the public records; to desert from the army, or to betray it to the enemy; to incite insurrection, sedition or rebellion; to encourage foreign kings to disobey the Roman government; to make war or to raise troops, without public authority; to kill a magistrate or minister of State, while in office; and to counterfeit the current coin. It was also treason in the governor of a province, if he refused to deliver up his province and the army to his successor.[1]

In the early English law, this crime was equally obscure. In the Mirror,[2] written probably before the Conquest, it was distinguished into "the crime of majesty," namely, killing the king, or disinheriting him by force of arms, or compassing so to do; or ravishing his wife, or eldest daughter, unmarried, or her nurse, or the king's aunt and heir; and the crime of "treason," which was said to consist in "the taking away of life or member, or decrease of earthly honor, or the increase of villanous shame," between those "allied by blood, affinity and homage, or oath and service." Bracton, who wrote later, and drew largely from the Roman Civil Law, says that the crime of treason is of various kinds, (*habet sub se multas species,*) enumerating not only killing the king, but inciting soldiers to sedition and mutiny, giving them aid or encouragement or consent; ("*licet id, quod in voluntate habuerit, non perduxerit ad effectum;*") and including that ill-defined offence, termed the *crimen falsi*, very justly adding, "*quod quidem multiplex est.*"[3]

Thus it stood at the common law, much being left to the judges, to determine constructively what was treason; and hence the great number of constructive treasons, increasing in proportion to the power and influence of the reigning monarch and the pliancy of dependent judges, until the tenure of life itself was essentially impaired, and the burden upon the people became intolerable. The statute of 25 Edw. III., c. 2, was therefore enacted, to relieve his subjects from the evil of such distressing uncertainty in the state of the law, by defining what offences alone should in future be deemed treasons, reducing their number to seven. Others were added in succeeding reigns, and sixteen more in the bloody reign of Henry VIII.; but

[1] Dig. lib. 48, tit. 4; Cod. lib. 9, tit. 8, l. 5; Idem. tit. 24, l. 2; Wood's Inst. p. 270; Halifax's Analysis, Rom. L. p. 129.

[2] Horne's Mirror, p. 16, 24.

[3] Bracton, lib. 3, cap. 3, § 1, fol. 118, b.

these were abrogated, and the law restored, in the reign of Mary, to the enumeration in the statute of Edward III. Others again were added in subsequent reigns, so that, at the commencement of our Revolution, there were in England, according to Blackstone, ten distinct species of treason; namely, compassing the death of the reigning sovereign or his eldest son and heir; violating the person of the queen consort, king's eldest daughter unmarried, or eldest son's wife; levying war against the king; adhering to his enemies, giving them aid and comfort; counterfeiting the great or the privy seal; counterfeiting the king's money, or bringing false money into the realm; killing the chancellor, treasurer, or either of the judges, while exercising their office; adhering to the pope, or defending his jurisdiction in the realm; counterfeiting foreign money, made current by proclamation, or counterfeiting the royal sign manual or privy signet, or clipping the coin, or possessing implements for coinage; and impugning the Protestant succession, as settled by law.

From this statement of the law of England, it is easy to understand how our fathers became the strenuous opposers of all sorts of constructive treasons, and why they confined this offence to two species only, and these so precisely defined as in the Constitution.

The offence of levying war against the United States, upon which we propose to offer a few remarks, has lately been the subject of discussion in the Courts of the United States, in Pennsylvania, by Judge Kane, of the District Court, and in Massachusetts, by Mr. Justice Curtis, of the Supreme Court; and we can do no better service to our readers, than to avail ourselves freely of their observations, and especially of the clear and powerful analysis of the latter. He commences by adverting to the fact, that the language of the article in our Constitution is borrowed from the statute of 25 Edward III.; and that as this language had acquired a settled meaning, both in the Courts, and among the people, at the time of our Revolution, it had very properly been expounded by the Courts, in the sense thus received and understood at the time. For it is a rule universally adopted and practised upon in all our State and National tribunals, when interpreting words and expressions in our statutes and charters, which have been previously used, and judicially expounded in the law of England, to take them in the sense then familiarly known

and understood; and this sense is best ascertained by judicial decisions, and the usage of celebrated elementary writers. (4 Cranch, 471, 472.) It is thus that we understand what is meant by the words "murder," "larceny," and many others used, but not defined in our criminal codes.[1]

Mr. Justice Curtis proceeds to say, that "This settled interpretation is, that the words 'levying war,' include not only the act of making war, for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination."

"The following elements, therefore, constitute this offence:

"1st. A combination, or conspiracy, by which different individuals are united in one common purpose.

"2d. This purpose being to prevent the execution of some public law of the United States, by force.

"3d. The actual use of force, by such combination, to prevent the execution of such law.

"It is not enough that the purpose of the combination is to oppose the execution of a law in some particular case, and in that only. If a person against whom process has issued from a Court of the United States, should assemble and arm his friends, forcibly to prevent an arrest, and, in pursuance of such design, resistance should be made by those thus assembled, they would be guilty of a very high crime; but it would not be

[1] At the first trial of John Fries, for treason, Mr. Justice Iredell, in his charge to the jury, made the following observations on this subject. "When this Constitution was made, it was in the power of those who formed it, either to define treason or not, or, if they thought proper to do so, to do it in what manner they chose; in which they might have followed the example of the country whence their ancestors came, to which they were accustomed, and in which they were most experienced in their own several States, where the crime of levying war was denominated treason. I believe this has been generally followed through the States; in some I know it has. This term of levying war is an English expression, borrowed from the statute of Edward III.; but notwithstanding this, the principal provisions, respecting treason, are taken from an act of the British Parliament in the reign of William III., which is principally calculated to guard the independence of the court against the power of the crown, and the prisoner against his prosecutors. Now I must confess, as these able and learned framers of our Constitution borrowed the act, in terms, from the British statute alone, an authority with which they were familiar, that they certainly, at least, meant that the English authorities and definitions of those terms should be much respected. Those gentlemen knew, as well as any counsel at the bar, the danger of constructive treasons; they knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so wise, so cautious of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us, in later times, in the dark, exposed to so much danger as the gentlemen of the bar apprehend?" — See *Fries's Trial*, pp. 166, 167. See also *United States* v. *Mitchell*, (2 Dall. 348,) Judge Kane's charge, (4 Am. Law Journ. 84, 85.)

treason, if their combination had reference solely to that case. But if process of arrest issues under a law of the United States, and individuals assemble forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and, pursuant to such intent, force is used by them for that purpose, they are guilty of treason.

"The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws. Indeed such a distinction would be found impracticable, if it were attempted. If this crime could not be committed by forcibly resisting one law, how many laws should be thus resisted, to constitute it? Should it be two, or three, or what particular number, short of all? And if all, how easy would it be for the most of treasons to escape punishment, simply by excepting out of the treasonable design, some one law. So that a combination, formed to oppose the execution of a law by force, with the design of acting in any case which may occur and be within the reach of such combination, is a treasonable conspiracy, and constitutes one of the elements of this crime. Such a conspiracy may be formed before the individuals assemble to act, and they may come together to act pursuant to it; or, it may be formed when they have assembled, and immediately before they act The time is not essential. All that is necessary, is, that being assembled, they should act in forcible opposition to a law of the United States, pursuant to a common design to prevent the execution of that law, in any case within their reach. Actual force must be used. But what amounts to the use of force, depends much upon the nature of the enterprise, and the circumstances of the case.

"It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law. If a hostile army should surround a body of troops of the United States, and the latter should lay down their arms and submit, it cannot be doubted that it would constitute an overt act of levying war, though no shot was fired or blow struck. The presence of numbers who manifest an intent to use force, if found requisite to obtain their demands, may compel submission to that force which is present and ready to inflict injury, and which may thus be effectually used to oppose the execution of the law.

"But unfortunately, it will not often be necessary to apply this principle, since actual violence, and even murder, are the natural and almost inseparable attendants of this great crime."

Thus far, this learned Judge has confessedly stated the law of this species of treason, in perfect accordance with the decisions of the wisest and best of our statesmen and jurists, and with the unbroken current of public opinion. So it will be found by the professional reader, in the cases of *United States* v. *Vigol*, (2 Dallas, 346,) per Patterson, J.; *United States* v. *Mitchell*, (Ib. 348, 355); *Ex parte Bollman et al.* (4 Cranch, 75, 126,) per Marshall, Chase, Washington and Johnson, Justices; afterwards more fully expounded by Marshall, C. J., in *United States* v. *Burr*, (4 Cranch, 481–486; 2 Burr's trial, p. 414–420; 3 Story on the Constitution, § 1790–1795; 3 Story's Rep. 615.)

The learned Judge proceeds to remark, that

"It should be known also that treason may be committed by those not personally present at the immediate scene of violence. If a body of men

be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered guilty of treason. Influential persons cannot form associations to resist the law by violence, excite the passions of ignorant and unreflecting or desperate men, incite them to action, supply them with weapons, and then retire and await in safety the result of the violence which they themselves have caused. To permit this, would not only be inconsistent with sound policy, but with a due regard to the just responsibilities of men. The law does not permit it. They who have the wickedness to plan and incite and aid, and who perform any part, however minute, are justly deemed guilty of this offence, though they are not present at the immediate scene of violence."

This part of the law of treason will be found as well sustained by reason and authority, as that which has already been quoted. But as it is extremely distasteful to some of our citizens, who may indeed have reason to be sensitive on this topic, some further elucidation of its meaning and import may not seem altogether out of place.

The persons who, though not personally present at the actual perpetration of open treason, are nevertheless traitors, are of two classes; those who are constructively present; and those whose participation, though at a distance, is such as, in the case of any felony, would render them accessories before the fact. In regard to the former, the law of constructive presence, in its application to cases of murder and other felonies, has long been settled. Thus, if one performs his part, however humble, in an unlawful and felonious enterprise, expected to result in homicide, such as by keeping watch at a distance, to prevent surprise, and a murder is committed by some other of the party, in pursuance of the original design; or if he combined with others to commit an unlawful act, with the resolution to overcome all opposition by force, and it results in murder; or if he employed another person unconscious of guilt, such as an idiot, a lunatic, or child of tender age, as the instrument of his crime; he is held guilty of the murder, as a principal and an immediate offender. The same principle is applied in cases of burglary, robbery, and other felonies. Whenever several persons conspire in a criminal enterprise, which is to be consummated by some principal act or decisive stroke, to the accomplishment of which certain other acts or circumstances are subordinate and ancillary, though these latter are to be performed at a distance from the principal scene of action, and consist merely in watching and warning of danger, or in having ready the means

of instant escape, or the like, the law deems them all virtually present at the commission of the crime, and all alike guilty as principals. It was the consciousness of the proximity of the other confederates, or of their fidelity in the performance of their respective sustaining parts, that nerved the arm of the immediate actor in the crime, and therefore justly renders them guilty with him, as immediate and joint perpetrators. This doctrine was fully discussed in the case of the Knapps, (9 Pick. 496; 10 Ib. 477); but it is too well settled to require the citation of authorities. Its application to cases of treason is equally clear. (See *Burr's case*, 4 Cranch, 490–493.) The treason we are speaking of is the act of levying war; and we have seen that this may consist in the employment of combined force to resist the execution of a law of the United States; not in a particular instance or case alone, but in pursuance of a determination to prevent its operation at all, in any and every case. Wherever a body of men are assembled in force for such a purpose, and are in a condition to carry that purpose into effect, the assemblage itself is an act of levying war. (4 Cranch, 476, 487, 488, per Marshall, C. J.) So, if war is levied with an organized military force, *vexillis explicatis*, all those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may justly be said to levy war. (4 Cranch, 471, 473.) All that is essential to implicate them is, that they be leagued in the conspiracy, and perform a part which will furnish the overt act. (Ibid. 475.) And all are constructively present, who perform a part immediately ancillary to the principal overt act of treason. If the personal co-operation of the party in the general plan was to be afforded elsewhere, at a great distance, and the acts to be performed by him were distinct overt acts, he could not be deemed present at any acts except those to which his part was directly and immediately ancillary. (Ib. 494.)

It is manifest that to hold a party to have been constructively present at an overt act of treason, which treason itself is already expressly defined by law, is a very different thing from creating a new species of treason, by judicial construction; yet these two have sometimes been confounded, and in one instance, by a jurist of great eminence, (see Tucker's Blackstone, Vol. 4, Appendix B.), whose reasoning however, is sufficiently refuted by the observations of Marshall, C. J., in Burr's trial, (4 Cranch, 493–

502.) Professor Tucker puts the case of a person in Maryland, hearing of Fries's insurrection in Pennsylvania, and lending a horse or money to a person avowedly going to join the insurgents, in order to assist him in his journey; and asks if this would amount to levying war in Pennsylvania, where the lender never was? The answer is furnished by referring to the distinction taken by the Court in *Burr's case.* The indictment must state the specific overt act of treason. If what was done in Maryland was treasonable in itself, and is so charged, the trial must be had in Maryland, and the application of the doctrine of constructive presence is not required. But if the party was one of the conspirators, and his act constituted a part of the principal overt act of treason perpetrated in Pennsylvania, the State line, it is conceived, would interpose no objection to his being legally *particeps criminis;* any more than though being in Maryland, he shot an officer dead who was on the Pennsylvania side of the line. If a citizen of Newport, in Rhode Island, stationing himself at Seekonk, in Massachusetts, while Dorr's troop of insurgents were storming the arsenal in Providence, had supplied them with arms and ammunition for that purpose, could he have escaped conviction as a traitor in the county of Providence, on the ground that he was never personally in that county? Yet here would be no constructive treason. The crime would be treason by levying war. The overt act would be storming the arsenal in Providence; in which the prisoner bore an essential, though a subordinate, part. And if he bore such part, it surely can make no difference where he stood while he performed it.

We have said that the second class of persons, chargeable with treason, who were not personally and actually present at the perpetration of the overt act charged, consisted of those whose participation, in the case of a felony, would have rendered them accessories before the fact. For it is now too well settled to admit of question, that the law knows no accessories in treason; but that every one who, if it were a felony, would be an accessory, is, in the law of treason, a principal traitor. This rule, being now a constituent part of the law of treason, as administered in this country ever since its settlement, and in England for several centuries, its origin and history are of no importance. It is sufficient for us, that it is a part of the law of the land; and whatever may have been the reason

on which it was originally founded, its high expediency, not to say necessity, for the prevention of this greatest of crimes, amply justifies its retention as a rule of law.

We are well aware that, in *Burr's case*, this point was discussed before Marshall, C. J., and that he declined giving any opinion, because the case did not absolutely require it; and that, so far as the bias of his mind can be discovered, he seemed to doubt its application, in trials for treason against the United States, on the ground that the national tribunals could take no jurisdiction of crimes, under the common law; though he, at the same time, admitted that it was a sound rule of the law of treason against a single State. But it is to be observed, that when the Constitution or statutes of the United States give to their Courts jurisdiction over a crime, known to the common law, this law may always be consulted for the definition, extent and attributes of that particular crime, where the statute is silent on the subject. These Courts cannot assume jurisdiction of crimes, merely on the basis of the common law. Their jurisdiction must be given by express statute, or the Constitution; but, when given, the nature and extent of the authority may be ascertained by reference to the common law. To this extent, the Courts seem to have agreed. See *United States* v. *Coolidge*, (1 Gall. 488); *United States* v. *Hudson*, (7 Cranch, 32; Wilson's Works, Vol. 3, p. 371–377; Duponceau on Jurisdiction, *passim*; 1 Kent, Comm. Lect. 16, p. 331–341.) Now, the Constitution makes it treasonable to levy war, but does not define the offence, nor describe the persons who may be said to have committed it. The common law does both; and is therefore to be resorted to for this knowledge. It says that every person, doing an act in regard to levying war, which, in a case of felony, would render him an accessory before the fact, is guilty of the treason of levying war.

In the trial of John Fries, Mr. Justice Chase, in his charge to the jury, said that, "In treason, all the *participes criminis* are principals; there are no accessories to this crime. Every act, which, in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal." (Fries's Trial, p. 198.) No exception was taken to this position, by the learned gentlemen who watched for the prisoner's safety, though they declined to assist him during the trial; nor is it known to have been impugned by any contrary decision.

It only remains, then, to ascertain what constitutes an accessory before the fact. And such is he, who, being absent at the time of the felony committed, does yet procure, counsel, or command another to commit a felony. Words amounting to a bare permission will not alone constitute this offence; neither will a mere concealment of the design to commit a felony. It is not necessary, to this degree of crime, that the connection between the accessory and the actor be immediate; for if one procures another to cause some third person to commit a felony, and he does so, the procurer is accessory before the fact, though he never saw or heard of the individual finally employed to commit the crime. (See Wharton's Amer. Crim. Law, p. 33 – 36; 1 Hale, P. C. 613, 615; Idem. 374; 2 Hawk. P. C., ch. 29, § 16); *Rex* v. *Soares*, (Russ. & Ry. 25); *The People* v. *Norton*, (8 Cowen, 137; Foster, Cr. L. 125, 126); *Macdaniel's case*, (19 How. St. Tr. 804); *Earl of Somerset's case*, (2 How. St. Tr. 965.) Where the principal acts under instructions from the accessory, it is not necessary, in order to affect the latter, that the instructions be proved to have been precisely followed; it will be sufficient if it be shown that they have been substantially complied with. Thus, if one instructs another to commit a murder by poison, and he perpetrates it with a sword, the former is accessory to the murder, for that was the substance of the instruction. So, if the person employed goes beyond his instructions, in the circumstances of the transaction, as, if he be instructed to rob, and in so doing he kills the victim, or if he be instructed to burn the house of A., and in so doing, the flames extend to the house of B., the person counselling and directing the act, is accessory to the murder, and to the second arson; for the latter was the probable consequence of the former; and every man is presumed to foresee and assume the probable consequences of his own acts. So, if the party employed to commit a felony on one person, perpetrates it by mistake on another, the party counselling is accessory to the crime actually committed. It is only when the actor totally and substantially departs from his instructions, that he stands alone in the offence. (See Foster, Cr. L. 369, 370 – 372; 1 Hale, P. C. 616 – 618; 1 Russ. on Crimes, 35, 36; Whart. Amer. Crim. L. p. 34, 35.)

Upon these principles it is, that every one who counsels, commands or procures others to commit an overt act of

treason, which is accordingly committed, is himself liable to the penalty of the law, as a principal traitor.

We have been thus particular in stating the law of treason, for the especial benefit of that class of persons, who counsel, advise, incite and procure others forcibly to resist the law of the land, in any and every instance in which its execution may be attempted, and it is accordingly forcibly resisted. Whether clerical or laymen, orthodox or heterodox, editors of newspapers or lyceum lecturers, Northmen or Southrons, whoever or whatever they be, thus doing, they are guilty of treason. It surely is quite time that some pulpit and some portions of the religious press were better informed of the nature and extent of legal obligation, and of social duty, their teachings on these subjects, when erroneous, being mischievous in the extreme. They will do well to ponder the warning of Judge Kane, in his recent charge, in reference to the Christiana outrage:

"There has been," said he, "I fear, an erroneous impression on this subject among a portion of our people. If it has been thought safe, to counsel and instigate others to acts of forcible oppugnation to the provisions of a statute, — to inflame the minds of the ignorant by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men, — to represent the Constitution of the land as a compact of iniquity which it were meritorious to violate or subvert, — the mistake has been a grievous one; and they who have fallen into it may rejoice, if peradventure their appeals and their counsels have been hitherto without effect. The supremacy of the Constitution, in all its provisions, is at the very basis of our existence as a nation. He, whose conscience, or whose theories of political or individual right forbid him to support and maintain it in its fullest integrity, may relieve himself from the duties of citizenship by divesting himself of its rights. But while he remains within our borders, he is to remember, that successfully to instigate treason is to commit it."

Our readers, we are confident, will be gratified with the concluding observations of Mr. Justice Curtis:

"The Court deeply regrets, that it should ever be necessary in this country, and under this government, to instruct a grand jury concerning the law of treason.

"But unfortunately recent events have shown, too clearly, that there is a great misapprehension in some minds concerning this subject, and that it has already become necessary elsewhere to institute inquiries and make presentments of this offence. With the temper of any portion of the public mind, so far as it manifests itself in discussion of any question, or the formation of opinions, or so far as it affects the political affairs of the country, this tribunal has no concern. But when it connects itself with the criminal law of the United States, when discussion passes into direct and urgent incitement to crime, when ignorant men are stirred up to form combinations to resist the law by violence, it becomes the duty of this Court to apprize you of the true character of these combinations, and the acts which grow out of them, and the responsibility which the law attaches thereto.

"I hardly need inform you that it is not material what law of the United States is thus resisted We can know no distinction between one law of the United States and another. If it were permitted to you, or to me, to be influenced by our own wishes, in determining what laws should be executed, and what might be resisted with impunity, we should live no longer under a government of men; the ever fluctuating opinions and feelings of man, being substituted for a known and stable rule of action, operating at all times, and operating equally on all; and the citizen would be held innocent, or guilty, not according to his wilful violation of a known rule, but according to the caprice of his judges. This is not the nature of the government under which we live. No such government could long exist in this country, or ought to exist in any country.

"I have no apprehension that any grand jury assembled here will, in this or any other way, be false to their important trust. I am sure the great body of the people of Massachusetts need only to know their duties under the Constitution to discharge them with fidelity. They love liberty, and they know that public order is essential to it.

"Liberty under law and by law is the only liberty which, since the origin of their colonial government, they have been willing to accept, and they are not likely, at this day, living under a Constitution to which they gave their deliberate consent, and to which they are cordially attached, to suffer any persons, whether strangers or citizens, to resist by violence any law of the land with impunity." S. G.

Recent American Decisions.

Circuit Court of the United States, District of Massachusetts, October Term, 1851.

HARVEY JORDAN, Appellant, *v.* ROBERT WILLIAMS.

SAME *v.* SAMUEL GATES.

Under the Act of Congress of July 20, 1840, § 16, the phrase "to lay their *complaints* before the consul," applies only to such causes of complaint as are specified in the Act, viz. that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, &c., &c., and not to sudden affrays or quarrels between the officers and crew.

The liberty given to the crew by said Act, to lay their complaints before the consul, is to be exercised under the fair and reasonable discretion of the master of the vessel, as to the time and mode of landing; and a refusal of duty on the part of the crew, because such permission is not given, would be justifiable only when such refusal is necessary to prevent the loss of the right.

Since the passage of the Act of July 20, 1840, when the master of a vessel in a foreign port, lays a complaint against any of his crew fully and fairly before the consul, and the consul upon examination finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a tort, the consul being answerable to the injured party for any malversation or abuse of power.

The detaining of the clothes of men imprisoned by the local authorities upon the request of the consul, by reason of information given him by the

master, while still belonging to the vessel and also after their discharge therefrom, is a breach of duty on the part of the master.

THESE were libels filed in the District Court by Williams and Gates, two of the crew of the bark Gibraltar, against Jordan, the master, complaining of an assault on board the bark, an imprisonment in the jail at Matanzas, and a conversion of the clothing of each libellant. The libellants testified for each other, and produced no other evidence. The Court, in deciding upon the matter of the assault, applied the well settled principles of law to the facts as shown in evidence, and held the conduct of the captain justifiable. The material facts in the second and third causes of action appear in the decision of the Court, which was given substantially as follows, by

CURTIS, J. — The second ground of complaint is, that the master caused the libellants to be imprisoned on shore in the prison of the local authorities at Matanzas. This is attended with much more difficulty, and presents some questions of general importance, which, so far as I have been able to learn, are now for the first time raised. The material facts sworn to by the libellants, so far as they agree in their statement, are these. Very soon after the termination of the affray above mentioned, (April 11th,) while the libellants and three others of the crew were engaged in removing the main hatch, the mate said to them with an insulting address, "I'll knock your brains out with a handspike." Williams then said to the master, "Captain Jordan, do you hear that?" and he replied with an oath, "I do hear it." Williams then said to the master, "I will do no more duty on board this ship until I see the consul." Gates and the other three men said the same, and all five left their work and went forward into the forecastle. The mate came to the forecastle and asked Williams if he was going to turn to, and Williams replied, "No; not until I have seen the consul." The mate told him he was a fool, and had better think no more about it. Captain Jordan then asked each man if he was going to turn to? and each answered, "No; not until he should see the consul." The master replied with an oath "that they should go in the ship, and that they would wish themselves in hell before the voyage was up." He soon after went on shore, and returned with two boats and armed men, who carried the men on shore and took them to prison. The next day, or the next day but one, the consul came to the

prison, and the men informed him of what had taken place, and he said he would see into it. In a few days he came again with the master, and asked the men, if they did not think they had better settle it and go aboard, and repeated the question to each man. All but one replied, that they were afraid of their lives after the threats that were made, and that one said he would go if the consul would give him a paper showing what had happened on board. This the consul refused. A few days afterwards the master came again to the jail, asked if they were not tired of staying there, and said he had paid three months' board, and there might be enough for another month. He went away, and on the 8th of May, the consul took them out of jail, and sent them to the United States. In some material points, the above statement of the libellants is directly met by the answer, and is not consistent with the certificate of the consul, which has been by agreement read as evidence. Before adverting to some of these discrepancies, I must inquire whether the men were justified in their refusal to do any more duty on board, until they could see the consul. This right is claimed under the 16th section of the Act of July 20, 1840, which is in these words: —

"The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein, by the master or any officer, unless some sufficient and valid objection exist against their landing: in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board, and to inquire into the causes of the complaint, and to proceed thereon as this act directs."

But this does not in terms give the crew the right to refuse duty until they can see the consul. It may fairly be implied that they are not bound to do such duty as would prevent the exercise of the right to see him. They cannot be lawfully required to get under weigh to go to sea, and thus be deprived of their right to lay before him their complaint of the unseaworthy condition of the vessel. They cannot be prevented from landing and laying their complaints before him, unless some sufficient objection exists against their landing. But it by no means follows that they have the right, at any moment, to refuse any duty whatever until they have seen him. Such a refusal may be justifiable to prevent the loss of the right, but I think

very bad consequences would follow from admitting that any thing else would justify it. The master is to allow them the fullest liberty to lay their complaints before the consul, but the exercise of the fullest liberty to do so, when interpreted reasonably is consistent with the master's being allowed fairly to exercise some discretion as to the time and mode of landing, and as to the prosecution of the work of the ship.

But, in my judgment, the claim of the crew to see the consul, and their refusal to do duty until they should see him, cannot be supported by this act, because their complaint was not one which, within the design of the act, they could lay before the consul. It can hardly be supposed that Congress intended to secure to the crew the fullest liberty to apply to the consul concerning any matter or thing, of which they or any of them might desire to complain. Some practical result of such complaint, by means of some jurisdiction of the consul over its subject-matter, must be considered to have been the purpose of this provision of the act. To secure to the crew the right to land, or to impose on the consul the duty of immediately repairing on board, merely that he might hear, and do nothing, because he had no power to do any thing, cannot have been intended; nor is any such intent indicated by the language of this law. It says, "To lay their complaints before the consul." What complaints? This question is answered by the act which provides in section 9, for a complaint by a mariner, to a consul that he is detained contrary to his agreement, or after he has fulfilled it, and which directs how the consul is to inquire into the truth of the complaint, and what he may do if he finds it well founded; and by sections 12–15 inclusive, which authorize a complaint to the consul concerning the sea-worthiness of the vessel, and point out what proceedings shall be had, and what jurisdiction shall be exercised by the consul upon such complaint. When, therefore, the next clause says, The crew shall have the fullest liberty to lay their complaints before the consul; the natural meaning is, the complaints, which by this act they are authorized to make, and he is required to hear; and this meaning is made quite plain by the concluding words of this clause, which require the consul, in case the crew cannot land, to repair on board and "inquire into the causes of the complaints, and *proceed thereon as this act directs.*" If he is to do this when he goes to them, I presume he is

to do the same when they come to him, and if so, it necessarily follows, that the complaints which they have by this act a right to lay before him, are the complaints upon which the consul can proceed as this act directs. Not that they must be well founded in part or in whole; but that their subject-matter must be such, that if well founded, the consul by this act has authority to proceed thereon.

Now, I do not find that in this act or elsewhere, that power is conferred on a consul of the United States, to inquire into quarrels of this nature upon the application of the crew. The only approach towards such a case is in section 17 of the act, which is in the following words: —

"In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts, and if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of his discharge, three months' pay; and the officer discharging him shall enter upon the crew list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially."

It is to be borne in mind that this is a new power conferred on the consul for the first time; that it is a power to dissolve a contract, or rather authoritatively and finally to declare, that it has been so far broken by one party, that the other party is no longer under obligation to perform it; that this is a very high power, and is not to be extended to a case not fairly within the words of the act, which apply only to a particular class of cases where deserters are apprehended, and the desertion was caused by unusual or cruel treatment, and fall far short of cases like this, where, at the worst, only threats have been uttered. I am clear, therefore, that the refusal of the men to do duty can find no justification in this act; that this refusal, especially after the mate had asked the principal party to the quarrel to think no more about it, is strong evidence of an insubordinate temper, and justified the master in applying to the consul. That he did so apply I am satisfied. His answer so states, and though an answer has no technical effect as evidence, it is not wholly without weight in considering his conduct. There is nothing in the case tending to contradict this allegation in the answer, and the certificate of the consul, which is made evidence in the case, proves such application to him.

Being satisfied, then, that the master did apply to the consul, and that he had in point of fact a case to lay before

him, I do not think it reasonable to doubt that he did lay this case before him as he swears in his answer, especially when the consul certifies that on that day he acted officially, on the very ground that these men had refused duty. Nor can I come to any other conclusion than that the consul procured the interposition of the local authorities. The men, to be sure, both testify that the consul did not see them on that day, but so far as this tends to show that the consul did not interpose at all on that day, it is directly met by the answer, which says that the consul himself sent the officers who removed the men from the vessel, and the consul's certificate declares, in so many words, that he ordered the men to be imprisoned for safe-keeping in the royal prison. I must consider the imprisonment of these men, therefore, as an act of the local authorities, done upon the request of the consul. by reason of information given him by the master that the men had unlawfully refused duty; and the question is, whether the master is responsible for their imprisonment as for a tort.

Prior to the act of July 20, 1840, it had repeatedly been decided,[1] that a master could not lawfully imprison a seaman on shore, unless he were unable to restrain him on board; that a case of urgent necessity must be made out; and that although it would be a mark of good faith, on the part of the master, to take the advice of a consul, as being a person confided in by the government, for many purposes, yet such advice would not otherwise operate to protect the master, because consuls had no power or duty in reference to the matter.

I am satisfied of the correctness of these decisions, but I think the act of 1840 has materially changed the relation of consuls to this subject. The 11th section is as follows:—

"It shall be the duty of consuls and commercial agents, to reclaim deserters, and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end, in the most effectual manner."

This certainly confers on consuls authority, and, in strong terms, makes it their duty, to employ the local authorities to discountenance insubordination, when they can be usefully employed for that purpose, and, by a necessary impli-

[1] *U. States* v. *Ruggles*, (5 Mason Rep. 192); *Jay* v. *Almy*, (1 W. & M. 262); *Wilson* v. *The Brig Mary*, (Gilpin, 31); *Magee* v. *Ship Moss*, (Ib. 219); *The Nimrod*, (Ware, 9); *The D. Pratt*, (Ib. 503.)

cation, the consul must judge and determine whether any particular case is one in which they may be successfully employed. Certainly his decision is not final. If he is guilty of any malversation or abuse of power, the 18th section of this act makes him liable to any injured person, for all damage occasioned thereby, as well as to be punished criminally. But I think it was the intention of the act to intrust him with power, officially, to invoke the aid of the local authorities, subject always to a just responsibility for any abuse of this power.

If the local authorities are to be used, it is a reasonable, not to say necessary inference, that they are to act in such manner, and by such means, as they ordinarily employ, and the most common and obvious means are the use of a place of confinement, under the control of the local government. The power in the most effectual manner to lend their aid and use their exertions to employ the local authorities to discountenance insubordination, can hardly be said to be exhausted, while the means most usually employed by those authorities, have not been used. I think, therefore, that this act conferred upon consuls the power, and made it their duty, when the local authorities can be usefully employed, to restrain a part or the whole of a crew, who in their judgment, fairly exercised, are in a state of insubordination, to use their exertions to that end, in the most effectual manner; and that this restraint may be exercised by confinement on shore, in such place as is ordinarily used by the local authorities, for similar purposes. And, further, that the consul, in so doing, acts as a public officer upon his official responsibility, intrusted with the power to judge in the first instance of the propriety and fitness of so doing, and subject to his responsibility to any injured by an abuse of his power.

The reasons which have led Courts to determine that it is not one of the ordinary powers of a master, to imprison his men on shore, do not exist, or apply with greatly diminished force to the action of the consul in that behalf, on the information of the master. A public officer is thus interposed between the master and the seaman, who is to act under his official responsibility to the government, whose servant he is, as well as to the party affected by his act. He is a resident at the place, and cannot sail away and leave the men to suffer or die in a foreign prison. He is intrusted by law with the care of destitute seamen, and

with their return to their own country. It is to be presumed that he will have a due regard to the safety and rights of all, and while he discountenances insubordination by every means in his power, he will not employ the local authorities in a way to oppress the seaman. But whatever may have been the reasons which operated to produce this law, I think it has conferred on consuls the power above described.

If this be so, it is quite clear that the responsibility of the master is modified. If the consul may judge when the local authorities may usefully be employed, it would be a great hardship to hold the master responsible for a mere error of judgment of a public officer, in whose appointment he had no voice, and who is in no just sense his agent. At the same time, if the consul acts on the application of the master, the master is not free from responsibility. He is bound to represent the case truly to the consul, and the case must be such, that, as a reasonable man, he can honestly believe it to be within the power of the consul. If he knows, or ought to know, that it is not a case in which the local authorities should be appealed to, or, in the words of the act, "in which they can be usefully employed," then he necessarily knows that the case is not within the limited power of the consul, and that consequently he cannot shelter himself under his authority. But if the master represents the facts truly, if the facts are such that a competent master might well believe that the local authorities would be usefully employed, and the consul so considers and applies to them, and they, at the consul's request, take the men on shore, and then confine them in the place and manner usual at such port, I think the master is not guilty of any tort; although, upon a review of all the facts, the Court might be of opinion that it was not strictly necessary to remove the men from the ship.

Applying these views to this case, I find no evidence that the master misrepresented the facts to the consul, and I am not able to come to the conclusion that the case was of such a nature that the master ought to have known that the local authorities could not usefully be employed in the way they were employed. Five out of seven of his crew had unlawfully refused duty. They had been appealed to by the mate, who alone had given them any cause of complaint, in a manner calculated to allay any apprehension which they might have entertained, but they still refused.

Each had been required by the master, and each had distinctly refused. A deserter who was on board, could hardly be relied on for any very effectual assistance, and one officer and one man and a boy were all that were left. Under these circumstances, some masters might, and probably would, have reduced these men to obedience, on board the ship; but I cannot say that it was a case where the master ought to have known that was the only proper course, and therefore I am of the opinion that the master is not responsible for a tort, by reason of their imprisonment. Nor do I think he incurred that responsibility by their remaining in prison. It is quite clear that he was anxious to have them return to their duty, and gave them early and repeated opportunities to do so. They steadily refused, alleging that they were afraid for their lives if they went on board. If five able-bodied men really had such fear of the master and mate, who alone had shown any disposition to injure them, simply because of some threats uttered in the heat of blood, it seems to me to have been an unreasonable fear. It is observable that neither of the libellants asserts in his libel, or in his testimony, that he did really entertain such fear. Their justification for their refusal to return to the ship, resting solely on this fear, I think they should have pleaded it as a fact, and sworn to it as a fact, and not allowed it to rest solely on their statements at the time, which do not seem to have had a reasonable foundation in the occurrences, as they detail them.

After they had been in prison some days, the answer says eight days, and after repeated refusals to go on board, or do any duty if forced on board, the consul discharged them from the vessel, the master shipped other men in their place, paid to the consul fifty dollars for their passage-money to the United States, and one hundred dollars more for expenses arising out of their arrest and board in prison; and from that time the answer avers, that the master had no control over or connection with them, and that whatever was done was done by the consul alone. The act of 1840 empowers consuls, upon the application of the master and any mariner, to discharge such mariner, if he thinks it expedient, without requiring the payment of the three months' wages. I do not understand from any of the proofs, that these men applied in terms for their discharge, but I think their unjustifiable refusal to go on board, or do any duty if forced on board, would enable the consul to act on the

request of the master, and discharge them; and the men themselves evidently considered that they had, in effect, requested their discharge, for they have made no claim to be paid any wages. After they were thus discharged, I consider the consul, and not the master, responsible for their further detention. They no longer formed part of his crew; he no longer sustained any relation to them. The answer declares he did nothing to cause their further detention, and there is not sufficient proof to the contrary.

I am of opinion, therefore, that the responsibility for their further detention must rest with the consul, by whose order they were originally put in prison, and at whose sole instance they were kept there, after they were discharged from the bark. The answer states, that the consul said something to the master about sending them home to be tried, and, if he considered it his duty to detain them by the aid of the local authorities, that he might send them to the United States for that purpose, his conduct might be justified. On any other ground it was grossly improper, for he had no right to punish them by imprisonment, and surely destitute seamen are not to be provided for by a consul by keeping them in a foreign jail.

There is one other cause of action set forth in these libels, which requires to be distinctly considered. It is, that the men were sent to jail without any clothing or bedding, which was detained on board the bark, and finally sold by the master. It is in proof that the libellants slept on the flag-stones, using their boots for pillows, and that during all the time they were in prison they had no clothes except the working dress in which each was when taken on shore. This detention of their clothing is not justified, and no excuse is attempted, except that the answer alleges that the consul told the master their clothing was forfeited. But it does not appear when this information was given, and it is difficult to see how it could have been supposed to be correct. Before the men had finally refused to return on board, and while it was yet uncertain whether they would return, there could be no pretence for treating them as deserters, and when it became certain that they would not voluntarily return they were regularly discharged, and desertion became impossible. I consider it to have been a breach of duty by the master, and a wrong to these men of a somewhat aggravated character, to detain all clothing from them during eight days, and then sail away and finally

deprive them of it. I shall therefore allow to each the pecuniary value of his clothing, together with the sum of eight dollars, for special damage, arising from its detention while in prison. From analogy to the rule followed by Judge Hopkinson in the case of *The Maiden*, (Gilpin, 294,) I should deduct a proportionate part of the prison fees and expenses, and the cost of shipping the new men, if I did not consider that the wages remaining unpaid to each of these men, at the time of their discharge, was just about a fair compensation for their proportions of these charges; and it seems to me that, under the circumstances, it is just that the ship should neither lose nor gain by their discharge. It is not easy to affix a value to the clothing of each libellant. It is sworn to be worth from eighty to one hundred dollars for each, and the answer puts it at a very much less sum. Upon the best judgment which I can form, I think the sum of forty-eight dollars will be a just allowance for their clothing and the special damage of each. This sum is therefore awarded to each libellant.

Supreme Court of Pennsylvania.

Albert G. Allen *v.* C. J. Maclellan.

The Court of Common Pleas (which has original jurisdiction in cases of divorce, with an appeal to the Supreme Court,) has the power to vacate a decree of divorce entered at a previous term, where it was obtained by fraud on the Court, although a marriage had been contracted subsequently to, and on the faith of, such divorce, with a party thereto, and issue born.

A decree, reciting that the former decree was vacated for such causes, is conclusive after the time for an appeal has elapsed; and this, though there is nothing on the record to show that proof of the fraud was made, and although it was admitted that when service of notice of the intended application to vacate was made at the reputed residence of the original libellant, she was out of the State.

This was an action brought in the Supreme Court of Pennsylvania for the Eastern District (March term, 1848,) on a promissory note, made by C. J. Maclellan on the 5th of December, 1845, in favor of Lucretia Bleecker, and on the 19th of January, 1846, indorsed by William Wheatley, as husband of the said Lucretia, to Albert G. Allen, who thereon brought suit against the maker.

A case stated, in the nature of a special verdict, was agreed upon; the facts of which are as follows.

Lucretia Badger, being then a *feme sole*, was married

to W. W. Bleecker on the 14th May, 1840, and afterwards they cohabited together as man and wife. There was no issue born of this marriage.

On the 2d of August, 1845, by her *prochein ami*, she applied to the Common Pleas of Philadelphia County, for a divorce, on which sundry proceedings were had, and a decree of divorce, *a vinculo matrimonii*, was pronounced on the 25th of November, 1845. A copy of the interrogatories to be propounded to witnesses and of the notice of taking the testimony, was posted in the office of the Prothonotary of the Court ten days before the said examination. The evidence was taken and returned to the Court, and a decree entered as above.

A certified copy of this decree being exhibited to William Wheatley, by her *prochein ami*, the said Lucretia was married to him on January 12th, 1846: and on the 4th of November, 1846, a child was born.

The note in question was indorsed on the 19th of January, 1846, by William Wheatley, for himself and Lucretia Wheatley, late Bleecker, his wife.

On the 13th of February, 1846, W. W. Bleecker applied to the Common Pleas to revoke and rescind the said decree of divorce, in which application he merely denied the allegations of the libel, and declared that the said Lucretia had been, in 1844, guilty of adultery.

A notice of this application was proved to have been left at the reputed residence of the libellant, in the hands of her father and *prochein ami*. But the fact that she was at that time not within the State was communicated to the Court by an *amicus curiæ*, on the 7th March, 1846, when the following decree was entered:

"Ordered, that the proceedings and decree in this case be annulled, on the ground that the same was obtained by fraud and imposition on the Court."

Whatever evidence there might have been of such fraud and imposition, there appears nothing further on the record to show that any proof of it was taken preparatory to entering this order; or that the libellant ever appeared in Court.

The simple point made on the trial was, whether the plaintiff could recover on this note, on the indorsement of W. Wheatley; and the Court gave judgment for the plaintiff; and an appeal was taken to the Court in banc. The trial, at *Nisi Prius*, was before Burnside, J.

W. L. Hirst, (*Lambert* was with him,) for the appellant.

The case turns on the question, whether W. Wheatley was legally married to Lucretia Bleecker, late Badger, on Jan. 12th, 1846; whence arises his consequent authority to indorse the note, as her husband. The Common Pleas having annulled the divorce, the subsequent marriage is void; and this the Court had a right to do, on the ground of fraud. *Meadows* v. *Kingston*, (Amb. 156); *Prudham* v. *Phillips*, (Ib. 763); Harg. L. T. 456 (in note) S. C.

There is some evidence of service of notice, and the sufficiency of such service can never be brought into question collaterally.

Randall, *contra*. The jurisdiction of the Common Pleas, in cases of divorce, is created solely by the Acts of Assembly, and does not exist at common law; and therefore the provisions of the statute must be rigidly followed. *Miller* v. *Miller*, (3 Binney, 30.)

Have the Court power, by annulling their former decree, to retrospectively annul a second marriage made on the faith of such decree, and bastardize issue begotten in lawful wedlock? We contend no such power exists, even when it is argued that the Court were imposed upon by the libellant, through her next friend. None of the statutes of amending proceedings apply here. At common law, no judgment could be altered after the term during which it was signed and entered; and this power is now exercised only by virtue of the Statutes of Jeofails and Amendments. (Coke upon Littleton, 260; 2 Archibold's Practice, 231.)

Here, the divorce was of September term, 1845; and the proceedings to annul were commenced during December term, 1845, viz. Feb. 13th, 1846.

The Act of Assembly of 13th March, 1833, declares: —

§ 8. "It shall and may be lawful for the said Courts, after hearing any cause commenced before them by virtue of this act, to determine the same as to law and justice shall appertain, by either dismissing the petition or libel, or sentencing and decreeing a divorce and separation from the nuptial ties or bonds of matrimony, or that the marriage is null and void; and, after such sentence, nullifying or dissolving the marriage, all and every the duties, rights, and claims accruing to either of the said parties at any time theretofore, in pursuance of the said marriage, shall cease and determine, and the said parties shall severally be at liberty to marry again, in the like manner as if they had never been married."

And, by the 13th section of the same Act, and the 1st section of the Act of 8th Feb., 1819, either party may

appeal to the Supreme Court within one year from the date of the final decree.

And further, by Act of 21st March, 1806, it is provided that

"In all cases where a remedy is provided, or duty enjoined, or any thing directed to be done, by any Act or Acts of Assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or any thing done pursuant to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect."

This decree should be final and irrevocable; otherwise the rights of third persons, vested by intermediate legal acts, would be infringed. Acts which partake of the nature of a contract, should be held final and irrevocable. *Dartmouth College* v. *Woodward*, (4 Wheaton, 518); *Marbury* v. *Madison*, (1 Cranch, 157.)

In *Simms* v. *Slocum*, (3 Cranch, 300,) the Court held that a discharge under the insolvent law, obtained by *fraud*, so far as respects the prison-board bond, is good. And in *Bolton* v. *Johns*, (5 Barr, 149,) C. J. Gibson held a doctrine that supports our view of this case. The right of appeal within one year, gives the only means by which this divorce could have been reviewed; and if the Court can review their decision at the end of four months, they can with equal justice do it at the end of twenty years. It is entirely contrary to the spirit of our institutions to thus alter the rights of parties, or to render them legally guilty, for acts lawful at the time done.

The opinion of the Court was delivered by Gibson, C. J. The case which most distinctly recognises the power of a spiritual Court, to vacate its sentence, when obtained by imposition, is *Prudham* v. *Phillips*, stated in *Meadows* v. *The Duchess of Kingston*, (Amb. 763,) and rather more fully in 1 Harg. Tracts, 456, *note*. It was tried before Chief Justice Willes, in 1737; and, though a *nisi prius* decision, it was quoted with approbation by Lord Apsley. To show, by analogy, that the sentence in a suit of jactitation of marriage, is conclusive in a common law action, the Chief Justice took a distinction founded on the common law principle, that a party to a fraudulent judgment can reverse it only directly, but that a stranger may reverse it collaterally, by pleading and evidence. "Who ever knew," he said, "a defendant plead that a judgment against him was fraudulent? He must apply to the Court; and if

both parties colluded, it was never known that either of them could vacate the judgment. Here the defendant was party to the sentence; and whether she was imposed upon, or she joined in deceiving the Court, this is not the time and place for her to redress herself. She may, if she has occasion, appeal or apply to the proper judge." So was it with the legitimate husband, in the case under consideration. The time for appeal had gone by, and he applied to the only tribunal that was open to him. Chief Justice Willes does not intimate how it ought to proceed on the application; but it must necessarily be by summary examination and order. In Bacon's Abr. Error, J. 6, the remedy for a surreptitious judgment at common law, is said to be a writ of error, *coram nobis;* but *Rouney* v. *Robinson*, (2 Roll. Abr. 724,) which is cited for it, leans the other way. If a clerk of the King's Bench, it was there said, enter judgment against an order by a judge of the Court, it may be vacated at a subsequent term. If by a writ of error, it would have been unnecessary to say any thing about the time; and the meaning undoubtedly is, that such a judgment may be vacated after the term, just as if the record were still in the breast of the Court. That case shows that the principle of *Prudham* v. *Phillips*, is a general one, and applicable alike to ecclesiastical sentences and common law judgments. It has no relation to the doctrine of amendments, which make the record speak a language it did not speak before: the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. If it can be entered only on a writ of error, what is to be done with a surreptitious sentence of an Ecclesiastical Court, to which no such writ lies? As imposition on it would else be without the means of correction, it must necessarily have a power of summary reversion. Facts put in issue, as they may be, by the pleadings in error, are triable by jury; but as there is no jury in such a Court, there is the less objection to summary proceedings by it. There is certainly more reason for it than there was in *Rouney* v. *Robinson*. True, a statute has given the Common Pleas jurisdiction in a libel for divorce; but it has not made it a Court of record in any other respect than the one in which it had before been considered. Its proceedings, in divorce, are not according to the course of the common law—at least where a feigned issue is not directed—and no writ of error lies to remove

its sentence, whatever may be its power to remove the record of such an issue. In every other respect, the remedy is by appeal, as it is in the Ecclesiastical Courts.

It may seem an arbitrary act to expunge a sentence of divorce, with the stroke of a pen, to bastardize after-begotten children, to involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was in operation at the time; and, under this first impression, I would have decided as did the judge at *nisi prius*. But the legitimate husband also has rights; and if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract, he took the lady for better, for worse; and having assumed at least her moral responsibilities, he stands, as to hardship, in her place. He therefore has no right to complain. The children who are the fruit of the connection, are the only persons who have it, if, indeed, to have been brought into the world in any circumstances, can give such a right; but their condition is not worse than that of the dishonored husband. There is no injustice, therefore, in a proper exercise of the power assumed in this instance; and the apparent danger of excess in the use of it vanishes, when it is viewed in connection with a principle which requires the record to exhibit the ground of every judgment. Possibly there may have been no sufficient ground exhibited in this case; but even if there were not, the order to vacate would be only erroneous, and unimpeachable, after the expiration of the period for reversing it by appeal. In stating, however, the charge of imposition, without the facts and circumstances to sustain it, the Court has perhaps stated enough to justify their action upon it. Confidence must be reposed in the wisdom and justice of the tribunals; and hence the maxim, that all things are presumed to have been rightfully done in Courts of record. The indorser of the note in the suit before us, had no property in it; and the plaintiff has no title.

Judgment for plaintiff reversed, and judgment rendered for defendant.

Supreme Court of New York, May Term, 1851.

Argued at Albany, before Justices WATSON, PARKER, and WRIGHT.

GARRET HOUGHTALING v. GEORGE W. KELDERHOUSE AND JOHN KELDERHOUSE.

A person convicted of perjury is an incompetent witness, though he has been pardoned by the Governor, and the pardon purport to restore him to all his civil rights; the Legislature having provided, that such convict shall not be received as a witness till such judgment be reversed.

And such is the law, though the exclusive right of pardon be vested in the Governor.

Such incompetency to testify is a rule of evidence, rather than a punishment of the offence.

THIS suit was originally commenced before a Justice of the Peace, in assumpsit, on a promissory note. The defence was usury. The plaintiff recovered before the Justice on the 4th of September, 1846. The defendants appealed, and the cause was tried in the Albany Common Pleas, where the plaintiff also recovered. On the trial in the Court of Common Pleas, several exceptions were taken by defendants' counsel, who brought a writ of error to this Court. The facts appear sufficiently in the opinion of the Court.

H. G. Wheaton, for plaintiff. *R. W. Peckham*, for defendants.

By the Court, PARKER, Justice. The most important question in this case is, whether James R. Brice, who was offered on the part of the defence, was a competent witness. It appeared that he had been convicted of perjury in this State, and sent to the State Prison, in 1834, and was pardoned by the Governor in 1840. The pardon expressly purported to restore him to all his civil rights. The Court below held he was still incompetent as a witness under our statute, and refused to admit him to testify, to which decision the defendants' counsel excepted.

The statute (2 Rev. Stat. 567, 2d ed., § 1,) provides that a person convicted of perjury, "shall not thereafter be received as a witness to be sworn, in any matter or cause whatever, until the judgment against him be reversed." In all other cases of felony, the person convicted is declared incompetent to testify, unless he be pardoned. (2 Rev. Stat. 586, § 23.) The statute, therefore, recognises the efficacy of a pardon to restore the competency of a witness, in all cases of conviction, except for perjury.

It is urged by the defendants' counsel, that inasmuch as

the exclusive and full power to pardon for all offences except treason, and, in cases of impeachment, was vested by the Constitution in the Governor, (Const. of 1821, Art. 3, sec. 5,) the Legislature had no power to restrict the operation of the pardon in a case of perjury, and, that, therefore, the effect of the pardon in question was to render Brice a competent witness.

The doctrine of a restoration of the competency of a witness by pardon, is of comparatively modern origin. Lord Coke, (2 Bulst. 154,) is an authority against it. The maxim recognised was, "*Pœna potest tolli, culpa perennis erit.*" But at a later day the doctrine was established by Lord Holt and others in several decisions. *Rex* v. *Ford*, (2 Salk. 691); *Rex* v. *Greepe*, (Id. 514); *Rex* v. *Cusby*, (Id. 689, 3 Id. 155.) It was then held, that where the conviction was at common law, in which case the infamy was only a consequence of the judgment, the King's pardon restored the party to his testimony; but when the conviction was for perjury upon the statute, the person convicted could not be restored to his credit by the King's pardon; and the reason assigned was, that, by the statute, it was part of the judgment, that he be infamous and lose the credit of testimony. In such case it was held, he might be restored by a statute pardon. *Dover* v. *Mestayer*, (2 Salk. 691; 5 Esp. Rep. 94; Bull. N. P. 292; Phil. & Am. on Ev. 21, 22; 2 Harg. Jur. Arg. 221.) The statute on which that opinion was based, was 5 Eliz. ch. 9, § 6, which provided that when a person was convicted of perjury under that act, "the oath of such person or persons so offending from thenceforth, shall not be received in any Court of record within this realm of England and Wales, or the marches of the same, until such time, as the judgment given against the said person or persons, shall be reversed by attaint or otherwise."

The cases above cited, show that in England, in case of a conviction under this statute, competency as a witness might be restored by a statute pardon, though the King's pardon was ineffectual for that purpose; and it is claimed that inasmuch as, in this State, the Legislature have no power to pardon for such offence, but the exclusive power is vested in the Governor, his pardon must be effectual to restore the convict's competency. This is certainly very plausible reasoning, and if there were no interests concerned, except those of the convict, that is to say, if the incompe-

tency was merely a punishment for the offence, I should deem the position impregnable. It must be conceded that full power to pardon, in case of perjury, is vested by the Constitution in the Governor, and I think that power exclusive. In this respect the distribution of powers in our State, differs somewhat from that of the English government, where pardons may be granted by act of Parliament. (2 Black. Com. 402; Fost. 43; 2 Hawk, P. C. 397.)

But though the Legislature of our State has no authority to grant a pardon for perjury, it has full power to say who shall be competent witnesses. It may by statute admit or exclude any class of persons, such as parties or persons interested, or those convicted of crimes. The admissibility of all witnesses is a matter entirely within legislative control, and subject to its regulation. It is true, the disqualification of a person convicted of perjury may operate, to some extent, as a punishment of the convict; but whether such testimony shall be received, is a question in which others have a much larger interest. It is a question of public policy, with regard to which there may well be differences of opinion. On the one side, it may be said parties ought not to be deprived of such testimony, at the hazard of being unable to establish a legal right. On the other hand it may be urged, that such testimony would be dangerous to the rights of litigants, and unsafe in the administration of justice. The Legislature, in deciding this question, have regarded the latter argument as outweighing the former, and have excluded the evidence. And although this disqualification has been regarded as part of the judgment, as has been said in several adjudged cases, yet I think it is not merely a penalty for the offence, but an enactment of a rule of evidence, within the legislative jurisdiction, and beyond the reach of an executive pardon. I concur entirely in the view on this subject expressed by a writer in the American Jurist, (11 Am. Jurist, 360,) who says: "But although an incapacity to testify, especially considered as a mark of infamy, may really operate as a severe punishment upon the party, yet there are other considerations, affecting other persons, which may well warrant his exclusion from the halls of justice. It is not consistent with the interests of others, nor with the protection which is due to them from the State, that they should be exposed to the peril of testimony from persons regardless of the obligations of an oath; and hence, on grounds of public

policy, the Legislature may well require, that while the judgment itself remains unreversed, the party convicted shall not be heard as a witness. The statute of Elizabeth itself seems to place the exception on the ground of a rule of evidence, and not on that of a penal fulmination against the offender. The intent of the Legislature appears to have been, not so much to punish the party, by depriving him of the privilege of being a witness, or a juror, as to prohibit the Courts from receiving the oath of any person convicted of disregarding its obligation."

It will be observed that the language of our act is very similar to that of the English statute. Both declare that the testimony shall not be received. The writer in the Jurist above quoted comments on the fact that the Act of Congress, (Stat. of United States, April 3, 1790, § 18,) which declares the offender shall thereafter be rendered *incapable of giving testimony*, &c., until such judgment be reversed, has more the appearance of a penalty upon the offender, than the language of the English act. But the statute of this State is certainly liable to no such criticism, and I doubt whether its soundness will be recognised, whenever the question shall arise under the act of Congress. It seems to me, that, whether the statute provides that he shall be incapable of giving testimony, or says his testimony shall not be received, in either case, it will be viewed as a rule of evidence, though it may also operate as a punishment of guilt.

This view of the law is taken in 1 Greenl. Ev. 378, note, and was acted upon by Chancellor Kent in Holdredge *v.* Gillespie, (2 John. Ch. R. 35,) who excluded the deposition of a witness that had been convicted of perjury, though he had been pardoned by the Governor, on the ground that the statute declared him incompetent till the judgment was reversed. The statute then in force (Rev. Laws, 171) was similar to the provision of the Revised Statutes above quoted. It is said a construction ought not to be given to the statute that would deprive the Governor of the power to relieve by pardon, when it might be discovered too late to obtain a reversal of the judgment, that the party was innocent. The answer is, that if the Legislature have power to deprive others of the benefit of his testimony, they must also have power to restore it; and the parties interested, so far from being remediless, would have only to apply to the Legislature, instead of the Gover-

nor, for relief. I am, therefore, of the opinion, that the Court below decided correctly in rejecting Brice as a witness.

There were other exceptions taken on the trial in the Court below, that remain to be considered. After the plaintiff had rested, the defendants called Robert Frazier, and proved by him an admission made by the plaintiff, that he was in danger of losing the amount of the note in question, because he had received more than lawful interest. The plaintiff's counsel then cross-examined the witness. In the course of the cross-examination, the witness testified, that the plaintiff said, "he had received a new note, and that was worse than the old one." On a further direct examination, the defendants' counsel asked the witness if the plaintiff stated why the new note was worse than the first. This was objected to by the plaintiff's counsel, and the answer was excluded by the Court, to which decision the counsel for defendants excepted. This decision was clearly erroneous. There was no objection to the form of the question. The plaintiff's counsel had called out an additional admission, and it was the right of the defendants' counsel to inquire further in regard to it, and to learn all that was said upon the subject at the same time.

I think there were other errors committed in excluding evidence on the cross-examination of Slingerland; but it is not necessary to examine them at length, for the one I have already pointed out requires a reversal of the judgment.

The judgment must be reversed with costs, and a new trial awarded in the Albany Circuit Court.

Supreme Court of Vermont, Chittenden County, May Term, 1851.

HORACE FERRIS *v.* VICTOR ADAMS.

In Vermont a promissory note given by a deputy sheriff to the sheriff, upon his appointment as deputy, has no sufficient legal consideration, and is therefore void.

THE facts of the case sufficiently appear in the opinion of the Court, which was delivered by REDFIELD, J.

This is an action upon a promissory note for $30, executed by the defendant to the plaintiff, while sheriff of the

county of Chittenden, upon the occasion of appointing the defendant his deputy, for the ensuing year.

The leading inquiry in the case is, whether such a consideration is one upon which the law will uphold an assumpsit. It could scarcely be doubted at this day, we think, that the appointment of sheriff's deputy is a public office, and one which very considerably concerns the administration of justice. And it seems to be conceded in all the cases, that the sale of offices of that character, or of one's influence in obtaining appointments to them, is a transaction of so vicious a character, that it is no sufficient consideration for a promise. This is distinctly admitted, in terms, in *Richardson* v. *Mellish*, (2 Bing. R. 229; 9 Eng. C. L. R. 391,) which is the case most relied upon in argument for the defendant, and which, undoubtedly, is the strongest case in the English books, against holding contracts void, upon any supposed grounds of public policy. The Court, in this case, which concerned the appointment of certain persons to the command of merchant ships in the East India Company's service, hold, that such an appointment is not a public office. But Best, C. J., says, "I have never doubted, that it is an offence at common law, to sell offices." "If a man sells an office, he cannot maintain an action growing out of such a contract." This is the general current of all the English cases, and of all the English books upon this subject. (7 Bac. Ab. Tit. Offices and Officers, Letter F. 13.)

It is said to be legal for the principal, in appointing a deputy, to reserve a portion of the fees for services performed by the deputy, to himself, on the ground that all the fees belong to the principal. But so far as we can learn, it is every where, at common law, held to be illegal for the principal to stipulate with his deputy, for a gross sum, to be paid by the deputy, as the price of his appointment. The case of *Godolphin* v. *Tudor*, (2 Salk. R. 468,) maintains this distinction.

The case of *Rex* v. *Vaughn*, (4 Burrow, R. 2494,) is the case of an information against one, for attempting to bribe a privy counsellor to procure a patent for a public office in the gift of the King. And this was held to be an indictable offence, at common law. Lord Mansfield, in giving judgment against the respondent, in reply to the argument attempted to be drawn from the frequency of similar transactions, says, "If these transactions are believed to be

frequent, it is time to put a stop to them." The case of *King* v. *Plympton*, (2. Ld. Raym. 1377,) is a public prosecution against one, for attempting to bribe a corporator to vote for a particular candidate, for a corporate office, and is not important to the present question. *Law* v. *Law*, (3 P. Wms. 391,) is the case of brokerage of office, as it is termed, where the procurer took a bond of the incumbent for an annual stipend of £10. The Court of Chancery relieved against the bond. The Lord Chancellor held, that giving money to one to influence the commissioners, in whose gift the appointment is, was altogether as bad as giving money to the commissioners themselves, to secure the appointment. *Stackpole* v. *Earl*, (2 Wilson, R. 133,) is assumpsit upon a promise to pay the plaintiff £2 to find a purchaser for defendant's office of the port of London. It was held, an illegal contract, at common law. Justice Clive said, "he thought the sale of offices *malum in se*, at common law." *Garforth* v. *Fearon*, (1 H. Black. 327,) is where one man allowed his name to be used, to obtain an office in the customs, which it was agreed should be executed by the plaintiff, and he receive the profits; but after the appointment the defendant declined to do so. The Court held, that no action will lie upon such a contract, it being void, both at common law, and under the statute. *Harrington* v. *Du Chatel*, (1 B. C. C. 124,) is where one held the nomination of certain officers in the King's household, and nominated the defendant for one, taking from him a bond for 100*l.* therefor. Lord Thurlow granted a perpetual injunction against the bond, although he did not regard the case, as coming within the statute of Ed. VI., but treated it as a matter of public policy of the law."

Many other English cases might be cited, to show that, at common law, the sale of an office, or of any agency or influence in the procuring of one, is illegal, and that any contract, made upon any such consideration, is void. And it seems to us, that the appointment of a deputy, reserving a portion of the fees, although objectionable on many accounts, is less so than the sale of the office for a gross sum. This distinction is strictly maintained in the English statute, 3 Geo. I., in relation to the sale of the office of undersheriff.

Such a course affords perhaps less temptation to needless increase of the number of deputies, or to the appointment of unsuitable persons. It involves no stipulations either

express or implied, on the part of the sheriff, inconsistent with the general obligations of his office; and it seems to us, that taking a gross sum does. It seems to imply that the office shall not be revoked during the term. And this power of revoking the office of a deputy sheriff, is given partly for the public security, as well as for that of the sheriff. And it is an absolute power, vested in the sheriff, to be exercised without control or responsibility. And we think the sheriff ought not to be allowed to abridge or embarrass this power, or its exercise, by any collateral contracts growing out of the terms of the appointment. Whoever is appointed should be appointed freely, and the sheriff should remain at liberty freely to remove them. But if all sheriffs' deputies were appointed in the mode which the present contract contemplates, they could never be removed, without immediately raising questions, in regard to the sufficiency of the reasons for such removal, which is not what the statute contemplates. The deputy, who pays a portion of the fees, has not perhaps the same temptation towards extortion in office, as if he gave a gross sum.

The American cases, and the general opinion of the profession, certainly favor the view which we have taken of this case. The opinion of Woodbury, J., in *Meredith* v. *Ladd*, (2 N. H. R. 517,) recognises this distinction as valid and important. The learned Judge says, "But should even a deputy sheriff agree to pay the high sheriff a gross sum, at all events, the contract would be void." The same principle is virtually confirmed in *Carleton* v. *Whitcher*, (5 N. H. R. 196,) and in *Cardigan* v. *Page*, (6 Id. 182.) The same rule is recognised in *Groton* v. *Waldoborough*, (2 Fair. R. 306.) The case of *Love* v. *Bucknor*, (4 Bibb, R. 506,) is the very case before this Court, and the Court held the bond given to indemnify the sheriff against the defaults of the deputy, void. We should not perhaps be prepared to go that length. The case of *Lewis* v. *Knox*, (2 Bibb, R. 453,) is much like the last case. And the cases of *Overton* v. *Rhodes*, (3 A. K. Marshall, R. 205,) and *Baldwin* v. *Bridges*, (2 J. J. Marshall, 7,) are to the same effect.

The cases cited by plaintiff's counsel, *Farrar* v. *Barton*, (5 Mass. R. 395,) and *Matoon* v. *Kidd*, (7 Mass. R. 33,) do not seem to afford them much support. They were decided exclusively upon the statute of that State, by which the sheriff is prohibited from taking more than one fourth of the fees earned by the deputy. In those cases it

was held, that a contract stipulating for more was void. And so, undoubtedly, in that State, would be a contract recovering a gross sum.

The case of *De Forrest* v. *Brainerd*, (2 Day, 528,) seems to stand altogether alone, and is the only case which would justify a judgment in this case for the plaintiff. Aside from the current of authority against the case, there are other reasons why it is entitled to very little consideration out of that State. Indeed the decisions of that Court, when the Court was divided, have been very little regarded even by their own Courts.

This being, in our judgment, the state of the law upon this subject, it is impossible to regard the contract as valid and legal. We have been urged to uphold the present contract, upon the ground of the long continued practice of this kind. In answer to that, we can only say, that we know of no such practice, and if it do exist, it can make no difference. A party who takes a contract against the established policy, must be content to trust the honor of his debtor, and his sense of justice, and has no right to expect the aid of the law in his favor. We might, perhaps, with some propriety, adopt the language of Lord Mansfield in *Rex* v. *Vaughan, supra.*

Any argument attempted to be drawn from the statute, allowing towns to sell the office of constable, it seems to us, makes more in favor of the defendant than the plaintiff.

Judgment reversed and case remanded.

Abstracts of Recent American Decisions.

Notes of Cases decided in the Supreme Court of the State of New York, First Judicial District, General Term, June, 1851.

Present, Chief Justice EDMONDS, and Justices EDWARDS, MITCHELL and KING.

Statute of Limitations — What is a sufficient promise to revive a Debt barred by the Statute — What is sufficient evidence to support a Promise. In an action brought to recover a debt barred by the statute of limitations, *held*, that in or derto prevent the statutory bar, there must be an unqualified promise to pay the *entire debt*, either in express terms, or by a fair and just implication, from an explicit admission of it as a subsisting debt, for which the debtor acknowledged himself liable, and was willing and intended to pay. If the promise be conditional to pay when able, present

ability must be shown. A mere acknowledgment of a debt, and an offer to pay something, is not sufficient.

To support the action, one of the plaintiff's witnesses testified that the defendant told the plaintiff that he would give him two notes, one at six months and the other at twelve months; that he wanted the plaintiff to feel at liberty to call at any time; that he could call at any time, and expect something from him. The other witness testified, that the defendant said, this was a debt which he intended paying, and would pay; that he felt under obligation to pay the plaintiff, on account of services which he had rendered him. In addition to this, there was proof that the defendant was able to pay the debt claimed by the plaintiff. *Held*, that the evidence was not of that "equivocal, vague and indeterminate character leading to no certain conclusion, that ought not to go to the jury, as evidence of a new promise," (see *Bell* v. *Morrison*, 1 Peters, 351, and *Purdy* v. *Austin*, 3 Wend. 187,) and that a motion for a nonsuit was therefore properly denied. — *Sherman*, plaintiff in error, v. *Wakeman*, defendant in error.

C. W. Sandford, for plaintiff; H. G. De Forest, for defendant.

Subsequent to the commencement of the above action, the Legislature of New York changed the rule in reference to debts barred by the statute of limitations, providing that a promise, to have the effect of reviving such a debt, must in all cases be in writing, subscribed by the party to be charged thereby. The section of the statute is as follows: "Where the time for commencing an action arising on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment, or new promise, unless the same be in writing, subscribed by the party to be charged thereby." (See laws of 1848, p. 515.)

Second Judicial District, May Term, 1851, *at Brooklyn.*

Justices Morse, Barculo and Brown.

Murder — Statutory distinction between Murder and Manslaughter. The Revised Statutes of New York declare that the killing of a human being, without authority of law, "is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases: 1st, when perpetrated from a premeditated design to effect the death of the person killed, or of any human being; 2d, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; and 3d, when perpetrated without any design to effect death, by a person engaged in the commission of a felony."

The prisoner was indicted for the murder of one Kane, committed, as appeared by the evidence, in an affray, both being intoxicated. While engaged in a scuffle, the prisoner knocked Kane down, and stepped to a stone wall near, and took from it a large stone and carried it with both hands, and threw it upon Kane's head with such force as to cause death. The evidence tended to show the crime was committed in the heat of passion. The Court directed the attention of the jury to the second subdivision above quoted, and charged them that the facts of the case authorized a conviction under that section. The jury found a verdict of guilty. *Held*, that the charge was erroneous, and that the subdivision alluded to was wholly inapplicable to a case where there was reason to believe the killing was in the heat of passion. Such killing was not murder at common law,

and is not made so by the statute. In the case of a murder committed in the heat of passion the question is one of intent. The charge should have been, that if the jury believed the act was done with premeditated design, the prisoner was guilty of murder under the first subdivision; but if the act was done in the heat of passion, without such design, of manslaughter only. The second subdivision is applicable to numerous cases of murder known to the common law, where malice is implied, such as the case of a man shooting into a crowd, or throwing missiles from a house or wall into the public streets of a city, without regard to the lives of those who might be exposed, but not to the case of a murder committed in the heat of passion, whatever may have been the design.

Where the killing of a human being falls within any of the degrees of manslaughter defined by the Revised Statutes, it cannot be deemed murder, although it is accompanied by some of the circumstances which make the latter crime. — *The People* v. *Johnson.*

E. Wells, District Attorney, for the people. F. Larkin for the prisoner.

Action against a Town for alleged error of Assessors — Liability of Municipal Corporations — When liable for Neglect of its Officers. No action will lie against a town for an error made by the assessors in assessing property not within the county. Assessors being officers created under a general statute of the Legislature, are officers of the State, with duties circumscribed by territorial limits, and cannot be considered as agents of the town in which they are elected, so as to render the town responsible to actions in its corporate capacity, for their mistake, nonfeasance, misfeasance, or malfeasance. The mere fact that the assessors are elected by the towns, does not constitute the relation of principal and agent between them.

In the case of town officers generally, whose duties are prescribed by the statute, the towns in which they act are not liable to an action, for a violation of their duty. If any remedy exists, it is against the officer himself.

Municipal corporations are responsible for the neglect or violation of the duties of its officers, in those cases only where the officers are the agents of the corporation engaged in performing duties imposed upon the corporation; not where the duties are imposed by statute upon the officer.

Case in 12 Pick. Mass. Rep. 7, commented on, and considered as not fully sustaining a contrary doctrine, though from some peculiarities of the polity of that State, it would seem to favor, in some measure, an action of the description alluded to. — *Lorillard* v. *Town of Monroe.*

J. W. Gott, for the plaintiff. Morrell and Dunning for defendants.

Action on a Bond for Costs — Plea of nul tiel record — What is a final determination of a Suit, to authorize an action against the Obligors of a Bond for costs. The defendants were the obligors of a bond, conditioned to pay plaintiff costs, in case of a failure on the part of one Deyo in an action against the plaintiff. In the Court below, Deyo was successful. The case was then removed to the Common Pleas, and the judgment reversed, but the record was erroneously signed by the county judge of another county, who had no power under the statute of signing records out of his own county.

Held, that the plea of *nul tiel record*, interposed by defendants, was valid, the record of judgment being absolutely void. Also, *held*, that the rule for judgment of reversal was not sufficient to authorize a recovery, and that it was an essential fact to be established, that the former suit was finally determined, which could only appear by the judgment record. — *McGowan* v. *Deyo.*

Fullerton and Fowler for plaintiffs. Cook and Bruyn for defendant.

Voluntary Assignment by an Insolvent Debtor — Provision authorizing Asssignee to sell assigned Estate on credit. A debtor in failing circumstances executed an assignment of all his estate, both real and personal,

to a trustee, for the benefit of his creditors. The deed of assignment contained a provision, authorizing the assignee "to take possession of the real and personal property, and sell and dispose of the same at public or private sales, to such persons, for such prices, and on such terms and conditions, for cash, or upon credit, as in his judgment may appear best for the interest of the parties concerned, and convert the same into money," &c. Upon a bill filed by a judgment creditor of the assignor to set aside the assignment, *held*, that the same was fraudulent and void, and was made with the "intent to hinder, delay, and defraud creditors," for the reason that it authorized the assignee to sell upon credit. (Brown, J. dissenting.) — *Burdick* v. *Hunting*.

S. L. Gardiner, for the plaintiff. Geo. Miller for the defendant.

See also the case of *Barney* v. *Griffin*, (2 Comstock's Reports of Court of Appeals of N. Y.,) in which Bronson, J. holds the same doctrine.

Nuncupative Will. Where the testator, who was a mariner actually at sea, during his last illness, and within an hour of his death, made a nuncupative will in the presence of witnesses, by which he bequeathed to his wife all his personal property. The proof showed the making and publication of the will; that the deceased was of sound mind and memory, and not under any degree of restraint, and that he was in his last sickness, and a mariner actually at sea. The words used by the deceased and testified to by the witnesses, were, "I want my wife to have all my personal property."

Held, that the will had all the characteristics of a good, nuncupative will, and, as such, was entitled to be admitted to probate."

"The right, however, of a soldier in actual service, or a mariner at sea, to make an unwritten will is not an unqualified right which may be exercised under all circumstances. As the making of such wills can only be justified upon the plea of necessity, so they will only be tolerated, when made *in extremis*." Per Brown, J. — *Hubbard* v. *Hubbard*.

Geo Miller, for the plaintiff. S. D. Dayton, for the respondent.

Deed of Release — Effect of, when made by Heir. A. B., by his last will and testament, devised the uses and profits of certain lands of which he died seized, to his wife, from the time of his decease until his youngest child arrived at the age of twenty-one years, for the purpose of enabling her to educate and bring up his children; and if she failed to do this in a suitable manner, then his executors were empowered to let out the lands, and apply the avails thereof to this purpose. And within six months after the youngest child became of age, the executors were also empowered to sell the land at public auction, and after making provision for the widow's dower therein, the proceeds were to be equally divided amongst his five children. The will was duly proved, and the lands subsequently sold by the executor in execution of the trust. Prior, however, to the sale of the lands by the executor, one of the heirs of the testator executed a quit-claim deed to one Fisher, of all his right, title and interest in and to the real estate of the testator. *Held*, that the estate of the heir was an estate in fee in the one fifth part subject to the widow's dower, and to the power of sale given to the executors by the will, and the interest, claim, and demand which he had in and upon it, was the right to the one fifth part of the proceeds whenever the power was executed, and the estate converted into money. *Held*, also, that the deed of release by the heir operated not only upon the lands while they remained unsold, but also upon the proceeds after the sale, and that the grantee was entitled under the deed, to be paid by the executor, the money arising from the sale of the land. — *Reed, &c.* v. *Underhill*.

S. F. Reynolds, for plaintiff. R. R. Voris, for the defendant.

General Term, October, 1851.*

Chief Justice EDMONDS, and Justices MITCHELL and KING.

Bill of Lading — How far it may be explained — Right of a bonâ fide Assignee. Though as between the shipper of goods, and the owner of the vessel, a bill of lading may be explained as to quantity and condition of the goods, yet it may not be explained as between the owner of the vessel and a consignee or assignee of the bill of lading, who has, in good faith, advanced money on the strength of it, and has been led thus, by the master's signing the bill, to an act changing the situation of the parties. In such case the bill of lading, as to quantity, is conclusive upon the owner.

In such cases, the superior equity is with the *bonâ fide* assignee, who has parted with his money on the strength of the bill of lading. (See 6 Mass. Rep. 422; Abbott on Shipping, 323, 324.) Opinion by Chief Justice Edmonds. — *Dickerson* v. *Seeley.*

Action against a Foreign Corporation. A suit against a foreign corporation, cannot be commenced and prosecuted to judgment in the Courts of New York, unless the cause of action arose in the State, or the corporation has property therein which can be attached. — *Eggleston* v. *Orange Vale R. R. Co.*

Statute of Limitations. In an action against one of two joint and several obligors, where, to a plea of the statute of limitations, it is replied that the defendant had been abroad, and the suit had been brought within six years, excluding the time of his absence, it is no defence to aver and prove that the other assignor had been during the whole time within the State. The liability of the contractors being several as well as joint, the statute of limitations may apply as to one, and not as to the other. (See 1 Denio, Supreme Court Rep. 445, case of *Brown* v. *Delafield.*) Opinion by Chief Justice Edmonds. — *Vermilyea* v. *Bogart.*

Competency of Witness. In an action on a bond given on the discharge of a foreign attachment, the debtor is not a competent witness for the defendant, inasmuch as he is substantially the real party, the creditor being required to establish his claim in the same manner as in an action against the debtor. Opinion by Edmonds, C. J. — *Thompson* v. *Dickerson.*

Hypothecation of Stock, to Secure Notes of Pledgor — Right of Pledgee to sell — How Sale must be made. Where defendant gave his notes at three months, secured by an hypothecation of stock, which the lender agreed to hold for three months, though the defendant had his days of grace on the notes, he had none on the agreement, as to the stock, but it might be sold before the note became due.

Such sale must, however, be at public auction, and not at the board of brokers, without express consent to that effect, and, being sold at the board, without such consent, the defendant is entitled to be allowed the highest value of stock, after the time of sale proved on the trial.

This being proved to be one per cent. higher than was allowed, a new trial ordered, unless plaintiff consented to make that deduction from his recovery. Opinion by Edmonds, C. J. — *McCullough et al.* v. *Rankin.*

Summary Proceedings to remove Tenant. Where the term of a lease has expired by forfeiture, and not by lapse of time, summary proceedings cannot be taken to remove the tenant; the remedy to obtain possession in such case, being only by action.

A forfeiture of the term, created by a breach of a covenant, is waived by lapse of time, and subsequent receipt of rent by the landlord. — *Nixon* v. *Beach.*

Lien of an Attorney. After notice from the attorney, that the judgment which is for costs, belongs to him, the defendant cannot avail himself of a release obtained from the plaintiff in the suit. — *Johnson* v. *Anderson.*

Guardian and Ward Where the relation of guardian and ward has existed, and has just terminated by the majority of the ward, but the accounts of the guardian not yet settled, an indorsement by the ward of the guardian's note, given for a precedent debt, and procured by the influence of the guardian, cannot be enforced, in the hands of the creditor of the guardian, when he had cause to know enough to put him on inquiry. — *Gale et al.* v. *Weeds.*

Trustees of a Religious Corporation — Right to bind Corporation. Trustees of a religious corporation, actually in office, under claim of a proper election, though that election be afterwards set aside, have power to bind the corporation, while they are actually in office, and in respect to third parties, or strangers, in no wise connected with, or conversant of their defective title. — *Lovett* v. *German Reformed Church.*

Practice — Deposition of a Witness taken under Code of 1848 — *Effect of the Repeal of a Statute.* The code of procedure of 1848, provided, that, on a suit pending, where either party desired the examination of a witness, who shall reside more than one hundred miles from the place of hearing, or trial, he may obtain an order for the examination of the witness before the county judge, of his place of residence, by application to a Judge of the Court, in which the action is pending. This section was repealed by the code of 1849, without any saving clause. In a suit commenced after the code of 1848 went into effect, the deposition of a witness, residing in this State, but more than one hundred miles from the place of trial, was taken pursuant to the provisions of that code, but before the trial those provisions were repealed by the code of 1849.

Held, that the deposition could not be read, there being no law in existence warranting it, and the repeal of those provisions operating the same as if those provisions never had existed. — *McCotter* v. *Hooker.*

D. McMahon, for the plaintiff. Geo. W. Wright, for the defendant.

District Court of the United States, Southern District of New York, October 11, 1851.

In Admiralty, before Judge Betts.

Charter party — Charterer — When owner. Held, that a charter of a ship for a voyage or term of time, the charterer to victual and man her, and have entire control of her, renders the charterer owner for the time, and the real owner is not responsible for the contracts of the master *durante tempore*, if the creditor have notice of such charter. *Held*, that a sloop and craft navigating the waters of this State, or its vicinity, and taken by the master on condition that he victual and man her, and divide the earnings of the vessel with the owner, if such arrangement is known to the hands or seamen, the vessel is exempt from liability to the seamen for their wages on such hiring. Libel dismissed with costs. — *Isaac Devoe* v. *The Sloop Fashion.*

Collision. The sloop Transport, owned by the libellant, was anchored in the night-time, near the mouth of Newark Bay, and about one hundred and fifty yards from the Staten Island shore. The Rainbow, proceeding from Amboy to New York on a flood tide, with several barges in tow, came in collision with the sloop at about three o'clock, A. M., the 18th of August, 1850, and caused serious injuries to her. The evidence was con-

flicting as to the exact position of the sloop, and also as to the fact of her having a light suspended conspicuously, and burning at the time; although, on these points, the direct and positive evidence from the sloop must outweigh the negative evidence from the steamer. The master and pilot were in the wheel-house of the steamer, directing her navigation, and two men were on the deck, but no one was stationed forward as a look-out. The sky was clear above, and it was moonlight, but there was a haze or fog on the water, preventing the pilot of the steamer seeing the sloop until within about one hundred feet of her. He then endeavored to avoid her by stopping and backing his engine. The steamer was running about six knots by the land, close in to the right bank of the sound, and ported her helm to go inside of the sloop. *Held*, that the steamer was guilty of three faults in her navigation: First, in keeping up so great a speed in that narrow passage, as to be unable to stop and get out of the way of a vessel at anchor, when first in sight of her; second, by attempting to go inshore of her, there being a safe passage outside; and third, especially in running without a look-out stationed on the deck and forward part of the boat. Decree, that the steamer be condemned in the damages sustained by the sloop, and an order of reference to ascertain those damages. — *Samuel Acker* v. *The Steamboat Rainbow.*

Common Carriers by Water — Duty of Ship-Owners. The master signed a bill of lading in July, 1859, for return of twenty kegs of brandy, shipped on board from New York to Chagres, and sent back for want of a market. The vessel sailed the same month. The night the vessel left Chagres, she was struck by lightning, and compelled to put back for repairs. No materials or means of repairing her being found at the port, she remained there till supplies were sent on for the purpose from New York. The brandy remained on board. The captain was sick with the coast fever when the vessel left Chagres, and on her return was delirious. He was sent to New York in a steamer. Two or three weeks after, the mate was sent home, and two seamen also sick with the fever. The vessel and cargo were put in charge of an agent, or keeper. She lay at Chagres five months or more, and being sufficiently repaired for the purpose, was brought back to New York, when the consignor demanded the brandy. None was found on board. The claimants set up for defence, that the brandy was lost by leakage at Chagres, the casks being perforated by worms, and the iron hoops also having rusted, and burst off. During the time the vessel remained at Chagres, steamers and other vessels left that port, by which the brandy might have been transhipped to New York. *Held*, that it was the duty of the ship-owner to have had the brandy transhipped and forwarded to its port of destination, if the shipper did not accept it at Chagres, the voyage being in effect broken up. That the disabling of the master and mate by sickness, from attending to the duties of the ship, did not exonerate the owner from his responsibility, and that he stands liable on the bill of lading for the value of the brandy not delivered to the consignee. The value is to be taken at Chagres at the time of shipment. An order of reference must be taken to ascertain the worth of the brandy; but the claimant is at liberty to prove before the commissioner, an actual loss of any part of the brandy before the bill of lading was signed. — *James Phelan* v. *The Schooner Alvarado.*

Insolvency — State and Federal Courts. The defendant being master of a vessel, owned in this State, and he and the libellants being residents of this city, he purchased of them supplies for the vessel on credit. He was afterwards duly discharged by a Judge of the Common Pleas, under the insolvent law of the State, from all his debts. He did not put the debt of the libellants on his schedule, nor is it proved that they had personal notice

of his application for a discharge. *Held*, that there being no evidence of any fraudulent design, on the part of the debtor, in omitting the debt of the libellants from his schedule, that, by the law of this State, his discharge is a bar to their debt. *Held*, that the same rule applies in the United States Court, as between citizens of this State, when the debt was contracted and the discharge obtained here. Libel dismissed with costs. — *Abraham Cadmus & Co.* v. *Ransom Beman.*

Promissory Note — When payment. *Held*, that, by the commercial law, a negotiable promissory note, received in payment of a pre-existing debt, *bonâ fide*, and without notice, is not subject, in the hands of the holder, to the equities between the original parties, although it be an accommodation note, though the rule in the State of New York be otherwise. But *held*, that the acceptance of such note as payment, on the express assurance of the assignor that it was business paper, and not accommodation, does not amount to a payment and extinguishment of the original indebtment. *Held*, also, that a representation made by the assignee, at the time of transferring the note, that the parties were of high credit and responsibility, those parties not being residents of this State, and being unknown to the creditor, if found to be not true in point of fact, and circumstances indicating a knowledge of the debtor, that their credit and responsibility were doubtful, receiving the note on such representation does not extinguish the original debt. *Held*, that the creditor, on returning the note protested for non-payment, or dishonored, or offering it to the assignor in Court on trial, may maintain an action on the original debt. — *Seth Crosby and others* v. *John Lane.*

Ships and Shipping — Authority of Master to bind Owner — Evidence — Lien. The libellants supplied a ship belonging to the State of Maine, and owned by the respondent, with ship stores, &c., in this port, at various times, between July, 1819, and August, 1850, on the orders of her master. In June, 1850, the respondent paid the indebtedness then accrued for such supplies, to the amount of $409 30, and interest. The ship then being in this port, and fitting for a voyage to the East Indies, under the same master, the libellants, on the like order, furnished her stores and supplies for the voyage, and allege also that they shipped cargo on board. The master died at Manilla before the voyage was completed. The libellants proved, by the admissions of the master who succeeded him, that a portion of the libellants' cargo was appropriated at Manilla to the necessities of the ship. They also proved, that, in addition to ship stores and other supplies furnished the ship in New York, they advanced to the master various sums in cash, whilst she was here fitting out. *Held*, that the master had competent authority in law to charge the ship or owner for such supplies, and that it was not necessary for the libellants to prove they were absolutely necessary for the ship, nor that they were actually placed on board. If they were such as were appropriate for the voyage, and were delivered pursuant to the order of the master, or in the usual mode of business, the owner was chargeable for them. *Held*, that by paying the former credit to the master and ship, the respondent gave an implied authority to the master to contract the subsequent debt of the same character. *Held*, that the declarations of the new master were incompetent evidence to charge the defendant on the claim of libellants for cargo shipped on board. They should proceed upon the bill of lading. *Held*, that advances of cash to the master created no lien on the vessel, and no liability of the owner, unless appropriated to her necessities, which the creditors must prove, as also the advance for insurance. A reference ordered to take the account upon the basis of this decision. — *William H. Merritt & Co.* v. *J. N. M. Brewer.*

Bottomry Bond — Lien, when lost. The bark Clarence was owned in Galway, Ireland, and arrived in this port disabled by perils of the sea, and consigned to the libellants, residing here. In order to make the necessary repairs, the master borrowed $7535.77 of the libellants; he drew bills on the owners in Ireland, for a portion of the loan, and on the 28th of April, 1849, executed a bond for $15,000, conditioned to pay for the same, loaned together with $1130.36 bottomry premium, within ten days after the safe arrival of the ship at Galway. The vessel arrived out safely, May 25th thereafter, and returned to this port in June, 1850. On the 27th of that month she was attached by process from a State Court, by creditors of the foreign owners, and was ordered to be sold by decree of the Court, July 31st, and was sold at auction thereupon by the sheriff, August 8th, 1850.

All the proceedings on the attachment were legal and regular. A bill of sale was executed by the sheriff to the claimants, who were *bonâ fide* purchasers, at the sale, and it does not appear that they had any notice of this bottomry claim, other than that implied from the suit being commenced prior to the day of sale. The master drew bills in favor of the claimants, on the owners, for the amount included in the bottomry. The libel was filed August 3d, 1851.

Held, that the bond given by the master was a bottomry security, legally binding upon the vessel, and that the bills of exchange drawn by the master, in favor of the libellants on the owners, were not the original security contemplated by the parties, but were collateral to the bottomry bond.

Held, that the libellants lost the bottomry lien by neglecting to enforce it within a reasonable time after the return of the ship to this port, and until after her arrest in this city, and a decree rendered for her sale in due course of law, in a State Court. A bottomry lien is not an incumbrance binding a vessel indefinitely. It must be pursued within a reasonable time after it is perfected by the happening of the contingencies on which it rests, and may be cut off or barred by a *bonâ fide* purchase of the vessel, when a reasonable period for enforcing the lien has elapsed. — *Persee et al.* v. *The Bark Clarence*,

Appeal — Costs. Held, that a suit in Admiralty on a money demand already due and payable, under $50, but which with the addition of interest exceeded $50, at the time the decree was rendered, and upon which a decree for more than $50 was given, was appealable under the acts of Congress, and by the rules of this Court, is a pecuniary action, and carries full costs. — *Jonathan Godfrey* v. *Daniel Gilmartin*.

Foreign Attachment — Stipulation — Stipulator's Liability. This was a suit by foreign attachment. The garnishee on the release of the defendant's property from attachment, entered into a stipulation in the sum of $900, conditioned to pay the money awarded by the final decree in the cause. The decree was a sum exceeding $900. The stipulator paid the libellant the $900, and moved the Court thereupon, that the stipulation be cancelled.

It was decided, (both Judges concurring in the decision,) that the obligation of the stipulator was limited to the sum of $900 named in the bond; as surety, he could not be compelled to pay more than the amount named in his engagement. — *Silas E. Burrows* v. *John Brown*.

Circuit Court of the United States, District of Rhode Island, November Term, 1851.

Respective Duties of the United States Courts and their Officers — Right of Foreign Consul to appear in the Federal Courts. This was the petition

of *J. B. G. Fauvel Gouraud, Vice-Consul of France*, v. *Burrington Anthony*, late U. States Marshal, for a part of the proceeds of the wreck of the Adolphe, which were in the hands of the marshal, to be paid into Court, in conformity to a previous decree. The petitioner not only appeared in his consular capacity, but presented letters of attorney from the late Consul General of France, and from the agent appointed by the tribunal of commerce, of Nantes, to settle the affairs of the owners of the Adolphe. The respondent presented an account of expenses charged against said proceeds, and alleged a payment of the balance to the salvors. It was contended for the respondent, that the petitioner had no right to appear, on the ground that consuls have no right to prosecute claims in the Courts of the United States, and that if he appeared as attorney, he should have brought his action in the name of his principals, and not in his own name. To this it was replied, that the amount of the expenses charged had never been adjudicated upon, and any payment to the salvors was not a proper payment, the decree requiring that the proceeds of the sale should be paid into Court. On the question of law, it was replied, that consuls had a right to sue, not only by virtue of the Consular Convention, of 1788, with France, the rights of which had vested in the Spanish consuls, by treaty of 1795, with Spain, and were restored to the French consuls, by the treaty with France, in 1800; but, by the general principles of law, respecting the privilege of consuls, fully recognised in the decisions of the United States Courts. The respondent claimed a right to sue in his own name, though acting as agent, from the fact that he had an interest in the suit. Judge Curtis decided that it was the duty of the marshal to have paid the proceeds of the sale into the registry of the Court, there to be disbursed under its direction, and that any settlement of accounts made by the marshal, without an order of the Court, was invalid. That it was the duty of the Court to see that its officers proceeded legally, and, although they could not do this upon their own motion, yet they would do it upon a suggestion to the Court, that the officer was not proceeding correctly; that in this case the petition was rather in the nature of such a suggestion to the Court than of a suit, and that it would act upon this suggestion, though the plaintiff had no authority to sue at the time the petition was filed, since he presents his *exæquatur* to the Court, when the case comes on for a hearing, which is sufficient authority for him to appear to protect the rights of French citizens. It was therefore ordered that the marshal pay forthwith the proceeds of the sale into the registry of the Court, and that the claims of said marshal for allowances be referred to an auditor, and all parties in interest be allowed to appear before the auditor, and be heard in the premises.

Pitman, for the plaintiff. Jenckes, for the defendant.

Costs — Clerk's Fees — Power of the Accounting Officers of the Treasury Department. The petition of William Stover, agent for fourteen fishing vessels, libelled in 1847, in the District Court, and appealed to the Circuit Court. The vessels were libelled by Edwin Wilbor, collector of the port of Newport. In the Circuit Court, the libels were ordered to be dismissed without costs to either party, the judge giving a certificate of probable cause of seizure, and deciding that the officers' fees should be paid, under the act of 1799, by the United States. At the time of the appeal, the vessels were ordered to be given up to the claimants, upon their giving bonds to pay the value of the vessels into the registry of the Court, if the Court should so order. Certain fees and expenses were ordered to be paid by the claimants, on the delivery of their vessels. The petitioner now asks that these expenses and fees should be refunded to the claimants. At the same time, a petition was filed by the Clerk of the Circuit Court, that the claimants should be required to pay him the fees, which had accrued

to him for services rendered at their request, and also he resisted the petition for refunding, on the ground that the expenses were incurred preliminary to, and in the delivery of, the vessels, at the request of the claimants. Although Judge Woodbury had ordered all fees of the officers of the Court to be paid by the United States, the treasury department refused to pay the fees incurred, at the instance of the claimants, stating that these fees should be paid by the claimants themselves, which was the ground of the petition of the clerk against the claimants.

The questions raised were, whether the accounting officer of the treasury had a right to go behind the certificate of the judge, allowing the fees of the officers of the Court, and whether these fees were costs, as alleged by the auditor of the treasury, or fees in the language of the statutes of 1792 and 1799, and whether the decision of the late Circuit Judge, when he gave his certificate of probable cause, was or was not binding upon the treasury department.

The case was argued by Benjamin F. Hallett, for the agent of the vessels, and by Joseph S. Pitman, for the clerk, and held for advisement; Judge Curtis saying that the questions were of great practical importance, and that he did not wish to decide them without first conferring with the other judges in Washington. Judge Pitman did not sit in this case.[1]

Practice. During the progress of the cause, (*Dexter* v. *Sullivan*,) Burgess, for defendant, applied for a writ of *subpœna duces tecum*, to have the original papers in a case in the Supreme Court of Rhode Island, brought into the Circuit Court; and the Court refused the application, on the ground that it would not make a demand on another Court, which would not be granted if made to this Court, it being a rule of the Circuit Court, not to allow original papers to go out of the clerk's office.

Decisions under the new Practice Act of Massachusetts.

Supreme Judicial Court, November, 1851.

This was an action by the plaintiffs, merchants, of New York, to recover on a note of hand, signed by the defendant. The defendant filed interrogatories to be answered by the plaintiffs, under the new code, and moved for a commissioner to be sent to New York. To this the plaintiffs' counsel made three objections: 1st, that the case was nearly reached, and the motion ought to have been made earlier; 2d, that the defendant had not annexed a proper affidavit. The affidavit was, that "he had reason to believe that he should derive some material benefit from the discovery," &c. He should also have added, that the "same was not sought for purposes of delay;" 3d. one of the interrogatories proposed was objectionable, and should be stricken out, namely, "Have you, or either of you, any correspondence relating to this case with your attorney; if yea, please produce and annex to your answer any and all said correspondence."

Dewey, J., ruled that the question objected to was clearly improper, and must be stricken out. The plaintiff must also make the additional oath, that the interrogatories were not proposed for purposes of delay. When these things were done, the commission might issue, and if returned

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[1] This point recently came before Judge McLean, in an action by the United States, against the late marshal of Michigan, for a balance alleged to be due the United States, from the marshal. The marshal filed in set-off, fees, &c., which had been allowed, and properly certified by the Court, but which were disallowed by the comptroller. The judge ruled that the set-off should be allowed, and the jury found for the defendant.

in season, very well; but he should not delay the trial for them a moment. — *Millets & Co.* v. *John Lilley.*

P. W. Chandler for the plaintiff. B. F. Cooke for the defendant.

Court of Common Pleas, Suffolk County.

By Judge Hoar.

A plaintiff cannot, as a matter of right, file successive sets of interrogatories to a defendant, and require answers under oath. But the Court will, as a matter of discretion, allow supplemental interrogatories to be filed, and require them to be answered, where new and unexpected facts are disclosed in the answers, or where for some reason, not involving neglect on the part of the interrogator, he has failed to obtain the information sought by his interrogatory. — *Fowle* v. *Gardner, et al.*

Held also, that an order to charge a trustee is not to be passed, except by consent of parties filed in the case, or upon a default, until the cause is brought upon the trial calendar.

Miscellaneous Intelligence.

The Attorney-General of England. — We take the following notice of Sir Alexander Cockburn from the London Law Magazine for November:

"When Mr. J. Payne Collier, in 1819, collected into one volume his 'Criticisms on the Bar,' which had first appeared in the columns of the 'Examiner,' he declined to answer the objections to his publication made by barristers; admitting that 'he had heard no objections seriously stated, and argued to the fitness of subjecting barristers to critical inquiry, except from barristers themselves.' Since his day the spirit of the bar has improved. Every member, who was the subject of his criticism, has disappeared from the list of advocates; many have since adorned the bench; some still live to adorn the senate. Fair and honest criticism was found not injurious to a Scarlett, a Best, a Piggot, a Gifford, a Denman, a Copley, a Romilly or a Brougham. The false fear has given way to a sounder feeling, — the merits of contemporary leaders are freely canvassed, even among the barristers themselves, and there exists little prejudice and no reason against the notice by a legal publication of the rise and progress of successful living advocates; nor is there any cause why their vigor or their weakness should be left unchronicled till the subjects themselves have passed to the tomb. Much of instruction may be gathered from a candid and impartial inquiry, — much may be discussed whilst yet there exist the means of alteration or correction, — much may be commended without any fair charge of flattery being sustainable. That a member has been successful, is of itself a *primâ facie* evidence of professional as it is of other worth. That a man has risen to the head of his profession in the present day, is at least a strong presumption that his worth and his talents are generally recognised. Moreover, that a man without family ties or party connections, — with nothing but his ability and his zeal to recommend him, — should become under the Whigs the first law officer of the crown is confirmation strong of talents well applied. Not from his position alone then, but for the varied particulars of his career, we now select for notice and for comment her Majesty's Attorney-General, Sir Alexander James Edmund Cockburn.

"In the year 1823, in his second year, Mr. Cockburn was a prizeman

for the best exercises in English and Latin, and received the prize for English essays at Trinity Hall, Cambridge; in 1825 he was a fellow-commoner; he there attained the degree of B. C. L.; and in 1829 became one of the fellows. In the same year he was called to the bar by the Society of the Middle Temple, choosing for his circuit the Western, and for his sessions the Devon. Of that society he is now a bencher.

"Twenty years ago, junior barristers had as great a difficulty to be brought into notice at Westminster Hall as they have at this day; but sessions practice was then more abundant. The new law of settlement had not reduced parish appeals to a minimum. The sessions tried many cases which in practice have been more recently reserved for the assizes. Thus many juniors became well known at their district sessions, whose names even were never mentioned in the Superior Courts. The Devon sessions in particular had been famous for the strength of the bar, Follett himself having been the leader. It was a good school for men who were afterwards to rise; and we fancy that we see in the Attorney-General marks, not a few, of his western training.

"Three years after his call, the Reform Bill passed, which completely altered the law, not only of the franchise, but as to the mode of ascertaining the right to vote; and the petitions, which followed the general election of the winter of that year, gave rise to a large number of new questions for the decision of the election committees, one of which alone occupied the attention of several Had it been otherwise decided, and if the right of the committees of the House to inquire into the qualification of the voter had not been confined to the cases, which had been subject to the previous decision of the revising barrister at the Revision Courts, one of the most valuable changes made by the new law would have been rendered futile. The decisions of the election committees, subsequently to the reports of Messrs. Daniel and Corbett in 1821, had not been reported. The intermission had been 'found to be productive of great inconvenience to the profession;' and Mr. Cockburn, in conjunction with another member of the western circuit, Mr. Rowe, now Queen's Counsel and Recorder of Plymouth, undertook to begin a new series. In the preface they state that 'they could have much wished to have followed the example of Mr. Douglas and Mr. Peckwell, in giving an introductory digest of the result and effect of the different decisions;' but the extent of the changes introduced by the new law, both in principle and practice, was so great, that no time was to be lost in publishing the most important points as they severally arose. Accordingly the volume was issued in parts, and we are left without that summary which the logical conciseness of one of the editors could well have supplied. Of the way in which these reports were composed, we have a fair test in the contemporary reports of Perry and Knapp. Both are skilful abridgments of the evidence and of the arguments; but to Cockburn and Rowe belongs the superior merit of perspicuity, without elaboration, and of greater facility of reference. The volume is less known than that of Perry and Knapp, because the latter has been continued in an uninterrupted series down to the Parliament of 1847, — like the ten years' Parliaments preceding the Reform Bill wholly neglected by the reporters, to the manifest injury of all future practitioners before the election committees, — whilst the work of Cockburn and Rowe ceased on the completion of a single volume.

"The session of 1833 also brought Mr. Cockburn his first brief as a parliamentary counsel. On the 26th March, with Mr. Beavan as agent, he appeared as junior counsel for the sitting members for Coventry, Mr. Henry Lytton Bulwer and Mr. Edward Ellice, the Secretary to the Treasury; in the same session he was junior to Sir W. Follett in the Lincoln

and Dover petitions, in each case for the sitting members. The cases were out of the ordinary run of petitions. In all three the qualification of the candidate was disputed, and no little legal ingenuity was required to show the legal qualification; whilst in the Coventry case the seats had to be saved notwithstanding the misconduct of the sheriffs, which was specially reported to the House, and notwithstanding the existence of serious riots. In all three cases the seats were saved. the questions as to the qualification had been argued by the leaders, giving little opportunity for any junior to display his ability. On the question of riot, however, and on the right of the sitting member to cross-examine a returning officer who was called only to produce the poll, the junior had the opportunity of showing the 'stuff he was made of.' The exertions of the advocate were not forgotten by the immediate client who had the power, and, as it proved, the inclination to reward. On the 18th July, 1834, the corporation commission was issued to inquire and report on the state of the corporations in England and Wales. Among the commissioners was Mr. Cockburn; and to him, in conjunction with Mr. Whitcombe and Mr. Rushton, the late police magistrate of Liverpool — than whom no one deserved and few obtained more lasting or more sincere marks of universal esteem — was assigned the North-Midland Circuit, comprising, amongst others, the then notorious corporations of Leicester, Warwick and Nottingham. The task was not easy; the corporators were not facile in their proceedings; the acts of themselves and their predecessors, when exposed to public view, would not stand the light of modern criticism or of more recent reforming notions; the task was, nevertheless, well performed. The general report of the commissioners, with the protest of Sir Francis Palgrave, is well known; and the three thick volumes of appendix containing the district reports, give a mass of information which could have been collected by no other means. The reports on Bridgenorth, Derby, Newark, Newcastle-under-Line, Retford, Stafford, Shrewsbury and Wenlock are the joint production of Mr. Rushton and Mr. Cockburn, and display a searching fullness and clearness, which we are inclined to ascribe largely to the painstaking carefulness of Mr. Rushton. The reports on Coventry, Leicester, Nottingham and Warwick are by Mr. Cockburn and Mr. Whitcombe. To Mr. Cockburn solely belong the reports on Bewdley, Kidderminster, Newport, Shropshire, Sutton-Coldfield, Tamworth and Walsall. They are drawn up with a scrupulous attention to impartiality; and whether the electioneering sale of the Bewdley seats be set forth in all its deformity, or the courtesy and openness of the Tamworth corporators be commended, there is a fairness and a firmness which well mark the character of the commissioner; yet the reports will not bear comparison with the joint productions in other parts of the district; they are less ample in some of their details, and they have evidently had less care bestowed on their composition.

"His employment on this commission brought his merits prominently to the notice of Mr. Joseph Parkes, at that time the astute head of the parliamentary election agents on the side of the whigs. A more acute client, or a firmer friend, no barrister could find; and, instructed by him, during the session of 1835, Mr. Cockburn appeared for the sitting member for Canterbury, in the first position, and for the petitioners in the second. He also held a junior brief, but had to pull the laboring oar in the New Windsor petition, acquitting himself with a quickness and tact which often carried the committee with him on points at least extremely doubtful.

"During the same Parliament, the railway bills began to form a prominent feature, and to increase largely the practice of parliamentary counsel. The lion's share of the retainers, undoubtedly fell to Mr. Austin; and no one will deny that his peculiarly persuasive manner, his dexterous dealing with hostile witnesses, and his quick perception of the prejudices or the

weakness of each particular member of the committee, rendered him amply deserving of the 'golden fee,' which company after company poured into his clerk's accounts. The position of a counsel before the committees of either House, is indeed peculiar; he needs more tact and manner than law, and more persuasion than eloquence. A barrister may succeed beyond all his competitors,

"though some plead better, with more law than he;"

yet there must be enough of eloquence to please and to convince; enough of law to keep the evidence within reasonable bounds; enough of experience to be able to refer with readiness to other decisions of other committees, and to known rules of practice there and elsewhere; enough of firmness to restrain the private or party fancies of individual members of the particular tribunal; enough of casuistry not to allow your opponent's case to break down the weak parts of your own; and, withal, a dexterity in not allowing that casuistry to be detected; and these qualities must be varied with each varying committee. Many of the modes by which a *nisi prius* advocate obtains his success, are not only worthless but injurious. Distortions of fact are most dangerous; appeals to the passions fail of effect; declamation is utterly ruinous to the declaimer. The critical acumen of an accomplished arguer in banco, and the nice discrimination or distinctions of decided cases, are wholly out of place. Conciseness and logical accuracy, which tell upon the mind of a single judge, are lost within the four walls of a committee room. Moreover, there are generally two or three members who really understand the question to be decided; a few who fancy that they know more than all the others put together; and many who think the whole affair a bore, and who neither know nor care to know much of the matter to be decided; and in election committees, under the old system, when the 'brains had been knocked out' by the respective agents, there was a party majority to contend with, when, to use an expression of a late honorable member, 'he had voted against his party on one division, and he would take care not to do it again.'

"Such was the nature of the tribunals before which Mr. Cockburn appeared. Receiving a fair proportion of all the good things that fell to the lot of the 'lucky few,' he fully understood the character of these tribunals, and he as fully succeeded in doing justice to his clients. Occasionally there was shown a little infirmity of temper, which told against him for the moment; and though he was less dexterous at fence than some of his colleagues, and less forcible in attack, he had one most distinct and excellent qualification, 'undaunted courage;' he was seldom to be foiled, never to be put down: his first employment in Parliament was in defence of the seat, and his great characteristic merit was in defence. Hopeless as others might think the retention of the seat, he was ready and willing to fight, so long as he was instructed; and if bribery were the charge trumped up, as it not unfrequently is against the sitting member's agents, no counsel could more firmly, or with more indignation, resist it, or more effectively save the candidate from the indiscretion or vice of the agent. His conduct on the Great Marlow petition, in 1842, is a case precisely in point. One of the counsel had commented strongly on the non-appearance of a lady of title, who was too ill to leave her room, to disprove a charge of personal bribery, and, with a sneer, had said that she need not have feared to appear, as she would have been cross-examined by one of her own rank; Mr. Cockburn disposed of the case and the sneer, by avowing that she feared neither the examination nor the examiner, and would as soon submit herself to the questions of the humblest members of the bar, as of the 'proudest bearer of an ennobled name.' The retort did its work, the charge of personal bribery was quietly dropped. In the Taunton peti-

tion, of 1838, he, for the first time, led the case, with Mr. Kinglake as his junior, and, with his usual success, defended the seat. He was in most of the English petitions of that year, including the memorable case of Evesham, where Sir Robert Peel was chairman, and Mr. Peter Borthwick was unseated, after the receipt by a schoolmaster of a silver snuff-box, with the singular inscription, '*Ex dono amici sui, qui conducit*,' or, as Peel freely translated it, 'The gift of his friend, who bought him.' The election cases of this session are ably reported by Falconer and Fitzherbert, and will repay the perusal of those anxious to pursue this part of the subject further.

"Now it was that Mr. Cockburn paid peculiar attention to the other branch of his profession, was diligent on his circuit, even leaving committees to be present at Exeter, and indicating his determination to be something more than a parliamentary counsel; a position profitable enough, but not one with which a counsel of ambition would rest content. He became also Recorder of Southampton, and in this situation obtained the praise of the inhabitants: the little that fell to his duty was done with care and discrimination. In 1841 he obtained his silk gown, and profitably extended that accumulation of fees, for which the election committees of the following year, and the railway contests of the subsequent sessions, up to the panic, afforded the most ample opportunities. For the legitimate reward of his toil he was neither too eager nor too careless. For the work that he did, he expected and his clerk insisted on the proper *honorarium*: and so far particular was he, that when a brief for an election committee was ready for delivery, but the fee was not forthcoming, on the assembling of the committee on a fine Derby morning, the parties found themselves minus their counsel; who acted on the good old saw, that 'A man may as well play for nothing, as work for nothing.'

"The year 1841 was otherwise fortunate for the reputation of Mr. Cockburn, and for the consequent future reward. He had now an opportunity of having his name brought most prominently before the public, in a case of considerable importance, to which public attention had been largely attracted; and in which a knowledge of the principles of the civil and the common law were necessary to aid a relative who had been improperly deprived of the office of Dean of York.

"His speech was acknowledged on all hands to be as able as elaborate, and to have met and disposed of the arguments on the other side, made by Sir John Campbell and Sir Thomas Wilde. It wanted, however, a reporter. Coming at the end of long previous arguments, and in the midst of the anxious preparations for an impending election, the daily newspapers contented themselves with a few lines of summary, and though the profession at large were aware of the line of argument, together with the skill and dexterity of the advocate, the authentic reporters do not give a line of the arguments: Adolphus and Ellis content themselves with a copy of the elaborate judgment of the Lord Chief Justice (Lord Denman); and the Court not entertaining any doubt upon the question, did not direct the parties to declare in prohibition, but made the rule for the prohibition absolute, thus virtually restoring Dr. Cockburn to the Deanery of York.

"In the next important case, and one in which the merits of the advocate became fully known, Mr. Cockburn was fortunate in having for the reporter a gentleman, who was of the legal profession, and to whom the merits of the advocate were not unknown. That speech was delivered in defence of M'Naughten, who had shot Mr. Drummond, and in support of the plea of insanity. The excitement was great — the popular feeling strong — the prejudice vast. It was the firm belief of most that Sir Robert Peel was to have been the victim, and not his secretary. Sir Robert's own notion must have been strongly in favor of the same view of the matter,

for he seldom left the House afterwards without the attendance of a policeman to his own home in Whitehall Gardens: the general sympathy was in favor of the premier and the sufferer: and the plea of insanity itself had been brought into something like disfavor, in the case of the pot-boy, Oxford. Moreover, Sir William Follett appeared for the crown. These were strong odds against an advocate, but the strength of his facts and his arguments was greater: and notwithstanding the prejudices of the jury, the force of reasoning prevailed — the unhappy man was saved from the scaffold: his subsequent conduct shows how correct that verdict was.[1]

"Four years afterwards, and during the prospect of a general election, it became known that Mr. Cockburn was a candidate for parliamentary honors, and was anxious to undergo the last test necessary for the attainment of the highest honors of his profession. He paid his addresses to the constituency of Southampton, professing those advanced liberal opinions which find favor with an increasing town like Southampton. It had been famous in election contests and election petitions; its fair fame had been clouded by practices not very seemly: a change had now come over the electors; the town was enlarged; the workshops were busy; the docks and the railway had rendered it important; and it vindicated its purity by electing Mr. Cockburn and another reformer, Mr. Wilcox, without a contest, on what is technically known as a 'dry election.'

"Lawyers of note are not very popular on their first entrance into the House of Commons. Many a man of eminence at the other end of Westminster Hall has made small progress in St. Stephen's Chapel There are great living instances of this want of success. There is, in fact, a general distrust of their powers; it is too often set down by other honorable members, particularly country gentlemen, that a learned member is too prosy, too technical, and has too little sincerity; that

> "On either side he can dispute;
> Confute, change sides, and still confute."

"After a time, the prejudice in the case of some learned members wears off, but it must be after trials made in the House itself, and after the whole body has had an opportunity of judging of the parliamentary, as distinguished from the forensic, merits of the individual. The new member for Southampton was sufficiently experienced in the ways and the feelings of the House not to attempt taking it by storm. He was tactician enough to court and win, and not to overawe. He spoke on such subjects as came within the range of his profession; he spoke shortly and well: moreover, he advocated judicious and practical reforms in the administration of the law; he gained the ear of the House. For a full display of his powers as a debater, he bided his time; he watched his opportunity. In the session of 1850, that opportunity arose, and was not lost. The Lords had passed a vote of censure on the government for the affairs of Greece. If the House of Commons had acquiesced in that vote, the Russell ministry was at an end; the honorable and learned member for Sheffield applied the touchstone by moving a direct vote of approval. It was thought that the division would be close, and much was at stake. The debate was conducted in a semi-legal manner, and lawyers were required to answer lawyers. Sir W. Page Wood made an effective reply to Sir F. Thesiger. Yet other speakers had to be answered. Application is understood to have been made to at least one learned member, who was indebted to the Whig party for professional advancement, to take part in the debate, and declined.

[1] We have not room for the extracts from his speech, as given in the Law Magazine.

The day and the chance had come for Mr. Cockburn, and the progress of the debate gave him a 'foeman worthy of his steel,' (Mr. Gladstone.)

"This speech was delivered on the 28th of June: the government had a majority; and on the 12th of July a new writ was moved for Southampton in the room of Mr. Cockburn, who had been appointed Solicitor-General. Thus within three years from his first appearance in Parliament he attained the first great step of office: the electors unanimously confirmed the ministerial choice as they did when, within another twelvemonth, on the elevation of Sir John Romilly to the Mastership of the Rolls, the Solicitor-General succeeded to the superior office of Attorney-General; an office which has been raised from the contempt into which it had fallen some thirty years since, by the successive abilities of Denman, Campbell, Follett, and Jervis; to the last of whom belongs the high credit, not only of conducting in a time of great excitement a series of political prosecutions, like Sir J. Campbell, with singular and uniform success, but of having at the same time conciliated public opinion and avoided the slightest charge of party persecution; who in addition to the heavy routine duties of his office sacrificed his strength, whilst he benefited largely the public and the ministry by the assistance he rendered both to the Home and to the Colonial Secretaries; and who, in the office of Counsel to the Treasury, has left for the assistance of his successors a gentleman (Mr. Welsby) whose sound legal acquirements are known to and appreciated alike by the bench and the bar. Of the aptitude of Sir A. Cockburn for the duties of his new office it is yet too soon to judge. In the chief case which has come before the Courts — the prosecutions by the Customs of the Dock Companies — the conduct of the case for the crown was beset with difficulties, and the crown counsel had to encounter the subtlety of Sir Fitzroy Kelly, and the unanimous hostility of the mercantile world. Of the opinions he may give on the cases submitted to him by the government, of the mode in which he may distribute the patronage which falls to his office, or on which he may be consulted, no materials for the formation of an opinion can thus early be before us. From his antecedents, however, we may express a confident belief, that the merits which distinguished the rising advocate will mark the official career of the head of the English bar."

Insurrections in Pennsylvania. — In answer to an invitation to take part in a democratic mass meeting, at East Smithfield, Pennsylvania, a short time previous to the late election in that State, the Hon. Richard Rush wrote a reply, of which the following is an extract: —

"Sydenham, (near Philadelphia,) September 23, 1851.

"Since the formation of the Constitution of the United States, there has never been, as far as I at present remember, any insurrection of any nature whatever, to overturn or resist by violence, the laws passed in pursuance of it, in any one State of the whole Union, except this; and we have had three.

"First, we had the 'Western insurrection,' as it was emphatically called, in 1794. It was a very formidable one. It pervaded nearly all the western counties of our State. General Washington, then at the head of the government, did all that he could at first, or that mortal wisdom could, to suppress it by conciliatory means; but finally it had to be put down by military force. Fifteen thousand men were called into the field, made up by requisitions from the militia of Virginia, Maryland, and New Jersey, as well as this State. This great force overawed further resistance to the laws. Criminal prosecutions and convictions for treason followed. The President pardoned the convicts.

"The second insurrection was in 1799, chiefly in Northampton county.

On that occasion, all attempts to execute civil process, for forcible resistance to certain laws of the United States proving abortive, the militia and volunteers from the neighboring counties were called upon to march to the scene of disorder. Through their instrumentality, in co-operation with the judicial power, submission to the laws was restored. Criminal prosecutions followed, as in the former case, against those who resisted them by violence, and convictions were had for treason. But here also the pardoning power of the President — the elder Adams — was interposed, and the scaffold not erected.

"The third occasion on which we arrayed ourselves against the authority of the Union, was in the Olmstead case. That strife brought us towards the brink of civil war, and at one moment not very far from it. When the marshal first attempted to execute the process of the Courts of the United States, in that case, he was resisted at the point of the bayonet. This was in Philadelphia. Finally the process was executed — not openly, but by secret skill, or some humane stratagem, and the spilling of blood happily avoided. Here again legal convictions for the offences took place, but punishment was remitted by President Madison.

"I do but recall facts. I intend no comments on them. History has written them down, and we cannot obliterate them. A Pennsylvanian myself, I desire to cherish a just pride in my native State. I am gratefully sensible to having had the honor of sharing in her counsels and confidence heretofore, and am proud of the long and high merits in her history, to counterbalance the occurrences I recall. But just in proportion as I ardently cling to such feelings, do I desire to give expression at this juncture, to an intense anxiety that she may be found to acquit herself well in all respects, in executing the fugitive slave law. She ought not again to swerve from her fealty to the Union, when professing that feeling, but avoid every appearance to it. She ought to rally around the fugitive slave law, in the spirit evinced at the vast Union meeting in Philadelphia, in November last, when whole thousands of our whig friends, though political opponents, enthusiastically cheered, with the devotion of patriots, and a wisdom above all party, the resolution for its full and hearty execution — not in its words only, but in its great import and transcendental national objects.

"I am compelled, however, for one, to say — indeed truth and frankness might well force it upon most of us to say — that our present attitude, in regard to that paramount law, is very extraordinary. It is worse than that of any one of the States composing this wide confederacy. That law is more vital to the preservation of the Federal Constitution, than any of the laws of Congress, or all of them put together, the opposition to which, produced the insurrection I have mentioned. This is my sincere belief. Yet already have we seen it resisted, and resisted to blood, in this State — not only once, but twice. There is no other State in which it has been resisted to extremities so deplorable. Is not this enough to startle Pennsylvanians — to make them look around — to ask themselves how it has come about, and, above all, what is the remedy? Before we give way to any excess of State pride, as thinking ourselves a main prop of the Union, we ought to think of the posture we are now thrown into, in presence of our sister States. First came the murder of young Kennedy, of Maryland, at Carlisle; next, the brutal killing and mangling of Mr. Gorsuch, another citizen of Maryland — his son, and others who accompanied him across our line, to aid him in obtaining his rights, also falling, as supposed at first, under mortal wounds and gashes. All this happening in one of the oldest and most popular counties of the State, amidst frantic yells and howlings, characteristic of savages! Alas for our good old Commonwealth, if no stop is put to such deeds! Instead of being the keystone, we shall become

the destroying power of this mighty and glorious Union. It is remarkable that in neither of the insurrections above mentioned, with the Olmstead case added to them, was there as much blood shed as already there has been in Pennsylvania, by forcible resistance to the fugitive slave law. Our annals in 1851 will thus take priority in blood-guiltiness, in opposing the statutes of the Union."

Additional Rules of the Circuit Court. — Circuit Court of the United States, District of Massachusetts, October Term, 1851, to wit, November 12, 1851.

It is ordered by the Court, that the following rules shall take effect in the said District on the first day of the May term of the said Court in the year eighteen hundred and fifty-two : —

" 12. On the calling of the docket on the first day of each term, or whenever the same may be called, if no attorney shall be present in Court to answer for the plaintiff, in an action at law, wherein no issue in law has been joined and no statement of facts signed and filed, and no verdict rendered, a nonsuit shall be entered. If no attorney shall be present to answer for the defendant in any such action at law, a default shall be entered; and judgment shall be rendered on such nonsuit or default, or both, unless sufficient cause be shown to the Court on affidavit, during the same term, and within such time as the Court may prescribe; in which case, the Court may order the entry of nonsuit or default to be stricken off, on such terms as shall be deemed proper.

" 13. Either party in any suit in equity, or admiralty, appeal, or writ of error, or action at law, in which any issue in law has been joined, or in which a statement of facts has been signed and filed, or in which a motion for a new trial or in arrest of judgment has been filed, may at any time, before the calling of the docket, or when the docket shall be called, have an entry made thereon, ' Set down for hearing.'

" 14. When an issue in law shall be joined, or a signed statement of facts, or a motion for a new trial, or in arrest of judgment, shall be filed, the clerk shall note the same and the time thereof on his docket.

" 15. When the docket shall have been called, the clerk shall make one calendar of the cases for trial by a jury, and another calendar of the admiralty, — appeals, cases in equity, and actions at law, in which an entry of ' Set down for hearing,' shall have been made, placing the admiralty appeals first, and afterwards the cases in equity and at law in the order in which they stand on the docket.

" 16. The Court will begin to hear the cases on this last mentioned calendar on the first day of the term, or as soon thereafter as practicable, in the order in which the cases stand, unless a substitution of one case for another should be made by consent of parties. And all parties will be required to proceed without delay or postponement, unless upon sufficient cause seasonably shown. The engagements of counsel in any other Court shall not be deemed sufficient cause, unless such counsel shall be actually employed in some other Court, at the time when the case is called, and shall satisfy the Court that such conflict of engagements could not reasonably have been anticipated, in season to employ other counsel in this or the other Court.

" 17. When the cases on the last mentioned calendar shall have been heard, or at such other time or times as the Court may order, the first mentioned calendar shall be taken up, and its trials proceeded in, without delays, and in like manner as is provided by the next preceding rule."

The following rules were adopted at the November term of the Circuit Court for the Rhode Island District, viz :

" That when the Marshal of the District of Rhode Island shall attach on original writ any live animals, or any goods or chattels, which are liable

to perish or waste, or to be greatly reduced in value by keeping, or which cannot be kept without great and disproportionate expense, the same may be sold before judgment on application to the Court in term, or either of the justices thereof in vacation, in the same manner and under like regulations as are presented for the sale of similar property, attached on original writ from the Courts of Rhode Island, by the fifth section of the act of said State, entitled 'An act prescribing the forms of writs and the manner of serving them.'

"That the personal estate, when mortgaged and in possession of the mortgagor, and while the same is redeemable, may be attached on mesne process or execution against the mortgagor by the Marshal of the District of Rhode Island, in the same manner as other personal estate, and may be sold or redeemed in the same manner and under like regulations as are prescribed for the sale and redemption thereof, by the 16th, 17th, 18th, 19th and 20th sections of the act aforesaid of the said State."

Joseph S. Pitman, Esq. has been appointed United States Commissioner for the District of Rhode Island.

Liability of Railroad Corporations. — At the October term of the Superior Court of Connecticut for New Haven County, in the case of *Roswell Hood* v. *The New Haven Railroad Company*, a verdict of $3400 was rendered for the plaintiff. The facts were these: — Mr. Hood, on the 15th of January last, bought a ticket at the office of the Railroad Company in New Haven, entitling him to a passage to Collinsville, (Conn.) He took the cars for Plainville, and there the conductor of the train took his ticket, and gave him in exchange a check entitling him to a seat in the stage from Plainville to Collinsville. On the road the stage was upset, and Mr. Hood's right leg was broken. For this injury the suit was brought.

For the defence it was contended that the Company, as a corporation, had no power to contract to carry passengers by stage, and that, if they had such power, they were not liable in this case; that the railroad and stage were distinct and separate lines, and did not participate at all in profit and loss, but passengers were ticketed through for the convenience of such separate lines as well as for the convenience of the passengers themselves. It was further argued that the accident was unavoidable. The plaintiff, however, produced evidence to show that it was the result of carelessness. The jury found as above.

Towage a Lien upon a Vessel. — Judge Wilkins, of the U. States District Court, at Detroit, has held in the recent case of *Eben Ward* v. *The Brig Banner*, that towage constitutes a lien or demand against a vessel. He says: — "The interest of the vessel is to make her voyage with convenient speed, and it is the duty of the master to resort to every means in his power, to attain that object. A vessel on her upward cruise, from Buffalo to Chicago, may be stranded or becalmed at the mouth of the Detroit river; or, being injured by a storm, may be compelled to make for the nearest harbor, to repair; in either exigency, towage would constitute a necessary service, to enable her to prosecute profitably her voyage. Such service is maritime, and within the legitimate scope of the master's authority."

An Irish Deponent. — The following is said to be a literal extract of a deposition in the Irish Court of Common Pleas: — "And this deponent further saith, that, on arriving at the house of said defendant, situated in the county of Galway aforesaid, for the purpose of personally serving him with said writ, he, the said deponent, knocked three several times at the outer, commonly called the hall door, but could not obtain admittance; whereupon, this deponent was proceeding to knock the fourth time, when a man, to this deponent unknown, holding in his hand a musket or blunder-

buss, loaded with balls or slugs, as this deponent has since heard, and verily believes, appeared at one of the upper windows of said house, and presenting said musket or blunderbuss at this deponent, said, 'That if said deponent did not instantly retire, he would send his, the deponent's, soul to ——,' which the deponent verily believed he would have done, had not this deponent precipitately escaped."

Notices of New Books.

Reports of Cases in Law and Equity, in the Supreme Court of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. VIII. pp. 704. Albany: Gould. Banks & Co., 475 Broadway. New York: Banks, Gould & Co., 144 Nassau Street. 1851.

This volume contains the decisions of the Supreme Court of New York, in the several judicial districts, during the year 1850. Among many other cases of interest, we notice the report of *The People* v. *Hermon Livingston*, in which the title of the defendant, to a portion of the manor of Livingston, was sustained. The report has not only the pleadings and the questions of law that were decided, but also a statement of the facts appearing in evidence upon the trial. We shall take an early opportunity to digest the most important cases in the volume. The typographical execution of the volume is also highly creditable to the publishers.

Reports of Cases argued and determined in the English Courts of Chancery, with Notes and References to English and American Decisions. By E. Fitch Smith, Counsellor at Law. Vol. XXV. pp. 672. Containing Hare's Chancery Reports, Vol. III, 1843, 1844—6, 7 & 8 Victoriæ. New York, Banks, Gould & Co., 144 Nassau Street. Albany: Gould, Banks & Co., 475 Broadway. 1851.

This volume contains the decisions of Vice Chancellor Sir James Wigram, in the years 1843 and 1844, reported by Thomas Hare. There are many references to English cases, and the American Editor has added several carefully prepared and valuable notes.

The same enterprising publishers have in press Volume XXVI, of this series of Chancery Reports, containing Volume V. of Hare.

Obituary Notices.

Died, in Philadelphia, November 18th, Judge John Bouvier, aged 63.

We take from the Philadelphia papers the following tribute to his memory: —

At a meeting of the members of the Philadelphia Bar, held at the Law Library, on the 20th November, 1851, the Hon. James Todd was called to the chair, and Henry M. Phillips was appointed secretary.

The chairman announced that the meeting had been called to express the regret of the members of the Bar for the death of their late associate, John Bouvier, and in an eloquent address referred to the character and virtues of the deceased, whom he had intimately known from early boyhood down to the day of his death.

Mr. Charles Wheeler then paid a tribute to the memory and reputation of Mr. Bouvier, after which the Hon. Joel Jones submitted the following resolutions, which were unanimously adopted, which he prefaced with the following appropriate and feeling remarks: —

"The event which has convened us is one of several similar events which have occurred within a few months. Falling as they have, within our professional circle, they are to us peculiarly impressive.

"Judge Bouvier was actively and earnestly engaged in his professional pursuits up to the very hour he was stricken down — so that if not literally in the midst of life, yet, in the activity of life, he fell under the fatal shaft.

"His career is interesting and instructive, and his success an encouragement to those who are called in early life to struggle with adverse fortune. From a memorandum put into my hands, I learn the following particulars: — He was born in France, in the department of Gard, a part of the ancient province of Languedoc. His parents belonged to the society of Friends. At the age of fourteen he emigrated with them and one brother to Pennsylvania, and landed at Philadelphia, in October, 1802. About a year afterwards, his father died at Frankford of the yellow fever. Being now an orphan, a stranger, and a youth, it was his good fortune to find a friend in the late Benjamin Johnson, a bookseller and printer, whose place of business at that time was in Market street, near Front. Mr. Johnson, who had been in France, and had experienced the hospitality of Mr. Bouvier's family, proposed to Mrs. Bouvier to take both her sons into his establishment and bring them up to his business. The proposal was accepted, and John Bouvier remained with him until he reached the age of twenty-one years. As a mark of the confidence and regard of Mr. Johnson and other friends, they set him up in business as a printer, in Cyprus alley. At this place Mr. Bouvier remained two years. He then removed to Cherry street, between Sixth and Seventh, where he continued in the same vocation about six months. From that place he removed to West Philadelphia, and built a printing-office, near the place where the Darby road parts from the turnpike. The building he erected, I am informed, is still standing. At that place he carried on his business prosperously, until the year 1814. Owing to the general depression of all kinds of business, he was compelled, at that time, under very disadvantageous circumstances, to remove to the western part of Pennsylvania. He settled at Brownsville, a small town on the Monongahela river, and on the road from Wheeling to Baltimore. At this place he conducted a newspaper, called the Genius of Liberty. In connection with this labor he commenced the study of the law, under the direction of the Hon. Andrew Stewart. At the completion of his preparatory course of study, he removed to Uniontown, Fayette county, where he was first admitted to the bar.

"On his application for admission, Judge Kennedy, late of the Supreme Court, at that time a member of the Bar of the county, was appointed one of his examiners.

"Soon after he returned to Philadelphia. He was admitted to the Bar of the District Court, April, 1824. From that time to his death, he labored industriously in his new vocation, with the exception of an interval, during which he held the office of Recorder of the city, and a Judge of the Court of the Criminal Sessions.

"Of Judge Bouvier's character and standing as a lawyer, it is unnecessary to speak; his printed writings, original and editorial, are well known and highly appreciated by the profession. Perhaps no book of the kind has ever been published in this country so generally acceptable to the profession at large, as his Law Dictionary. He was engaged in revising it for a new edition at the time of the unexpected attack of disease which terminated in death. His more recent work, the Institutes of American Law, has not been long enough before the public to have acquired the character which, it is believed, it will be ultimately found to deserve. It will be obvious, however, to any one, upon a cursory examination of these volumes, that they are the product of great research and labor.

"I forbear to detain you with any eulogium of Judge Bouvier as a man and citizen. It is sufficient to say he was highly esteemed for his many excellent qualities by all who knew him, and, I may add, most highly by those who knew him best. With a view to render a just tribute to his memory, I beg leave to submit to the meeting the following resolutions: —

"*Resolved*, That this meeting have heard with sincere sorrow of the decease of the Hon. John Bouvier, formerly Recorder of this city, a Judge of the Court of Criminal Sessions, and more recently a member of the Philadelphia Bar.

"*Resolved*, That by this afflictive event, the legal profession have been deprived of a laborious, useful and learned writer, the Bar of Philadelphia of an honorable and highly esteemed member, and the community at large, of an exemplary and eminent citizen.

"*Resolved*, That a Committee be appointed to convey to the family, the sentiments of high regard entertained by this Bar for the memory of the deceased, and of sympathy with them in their bereavement."

The chair appointed as a committee, Hon. Joel Jones, Charles Wheeler, Henry J. Williams, Edward Hopper, William Parker Foulke, and the chairman and secretary were added to the committee.

On motion of James Goodman, Esq., it was resolved, that the proceedings of the meeting be published.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, Albert	Cambridge,	Sept. 4,	Bradford Russell.
Allen, Stephen B.	Berkley,	Oct. 10,	E. P. Hathaway.
Allen, William F.	Oakham,	" 3,	Henry Chapin.
Allen, ——, *et al.*	Conway,	" 3,	D. W. Alvord.
Ames, Simeon S.	Boston,	" 22,	John M. Williams.
Baker, Benjamin	New Bedford,	" 3,	E. P. Hathaway.
Bartlett, Philander C.	Cummington,	" 27,	Myron Lawrence.
Bates, William A.	Weymouth,	" 8,	Francis Hilliard.
Bodman, Erastus	Williamsburg,	" 10,	Myron Lawrence.
Booth, Judson	Charlemont,	" 3,	D. W. Alvord.
Bradford, George B.	Boston,	" 13,	John M. Williams.
Bradford, William	New Bedford,	" 4,	E. P. Hathaway.
Brennan, Owen	Boston,	" 13,	John M. Williams.
Callender, Andrew J.	New Marlboro',	" 24,	Jonathan E. Field,
Carey, William A.	Roxbury,	" 14,	John M. Williams.
Cartwright, James	Georgetown,	" 20,	John G King
Caverley, Zekariah	Lowell,	Sept. 6,	Bradford Russell.
Cook, Zenas	Hadley,	Oct. 1,	Haynes H. Chilson.
Curtis, Herbert, *et al.*	Stockbridge,	" 28,	J. E. Field.
Damon, Franklin H.	Fitchburg,	" 23,	Charles Mason.
Davis, Kendall	Reading,	" 4,	Asa F. Lawrence.
Dickinson, Gardner, *et al.*	Conway,	" 3,	D. W. Alvord.
Edwards, Richard L.	Beverly	" 22,	John G. King.
Farless, Benjamin	Westminster,	" 22,	Charles Mason.
Foster, George H.	Boston,	" 31,	John M. Williams.
Foster, Joseph	East Bridgewater,	" 13,	Welcome Young.
Frost, William H.	Lowell,	" 17,	S. P. Adams.
Fuller, Leonard	Roxbury,	" 8,	Francis Hilliard.
Gay, Ellis	Dedham,	" 27,	Francis Hilliard.
Goddard, Silas	Millbury,	" 6,	Henry Chapin.
Godfrey, Francis B. *et al.*	New Bedford,	" 25,	E. P. Hathaway.
Gurney, Alonzo	Cummington,	" 25,	Haynes H. Chilson.
Haven, Josiah L.	Ashland,	" 8,	Bradford Russell.
Hawks, Joseph	Goshen,	" 17,	Myron Lawrence.
Hendry, Matthew F	Roxbury,	" 31,	Francis Hilliard.
Hilt, Henry	Dorchester,	" 17,	Francis Hilliard.
Holcomb, Henry D.	Cummington,	" 21,	Myron Lawrence.
Kimball, John	Boston,	" 21,	John M. Williams.
Jackson, James	Ashland,	" 10,	S P. Adams.
Judd, Samuel	South Hadley,	" 22,	Haynes H. Chilson.
Lindley, Warren J.	Watertown,	" 15,	Bradford Russell.
Martin, Milo, *et al.*	Stockbridge,	" 28,	J. E. Field.
Meeds, Cephas	Worcester,	" 9,	Henry Chapin.
Miller, David	Somerville,	" 14,	Asa F. Lawrence.
Moore, Erasmus D.	Boston,	" 24,	John M. Williams.
Morse, Joseph	Lancaster,	" 14,	Henry Chapin.
Norris, Samuel	Malden,	" 31,	Bradford Russell.
Parsons, Theophilus	Cummington,	" 10,	Myron Lawrence.
Paull, Levi, *et al.*	New Bedford,	" 25,	E. P. Hathaway.
Peck, Absalom C.	Belchertown,	" 28,	Myron Lawrence.
Ray, Pliny	Dorchester,	" 14,	Francis Hilliard.
Reed, Albert B.	New Bedford,	" 11,	E. P. Hathaway.
Richards, Asa F.	New Salem,	" 22,	D W. Alvord.
Richards, George H. *et al.*	West Roxbury,	" 30,	John M. Williams.
Richards, Henry, *et al.*	West Roxbury,	" 30,	John M. Williams.
Scudder, Marshall S.	Needham,	" 27,	Francis Hilliard.
Shephard, Anson	Conway,	" 3,	D. W. Alvord.
Shephard, Anson, *et al.*	Conway,	" 3,	D. W. Alvord.
Thompson, Charles J.	Colerain,	" 7,	D W. Alvord.
Towsley, James W.	West Stockbridge,	" 28,	J. E. Field.
Traflon, Charles H.	Boston,	Aug. 16,	Francis Hilliard.
Tukey, Francis	Boston,	Oct. 20,	John M. Williams.
Upton, Benjamin, *et al.*	Charlemont,	" 3,	D. W. Alvord.
Usher, Henry W.	Medford,	" 21,	Asa F. Lawrence.
Walker, Edward F.	Boston,	" 16,	John M. Williams.
Waterman, Nathaniel	Boston,	" 25,	John M. Williams.
Wilder, Benjamin	Winchendon,	" 15,	Charles Mason.
Woodward, Hiram C	Groton,	" 6,	Bradford Russell.